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Taxation and State Aid: The Notion of Fiscal State Aid and the Commission's New Approach

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Abstract

This thesis examines the notion of State aid, encompassed in Article 107(1) TFEU, as it applies to fiscal cases. This analysis is important, as the notion of fiscal aid is, due to its fiscal subject matter, different from the notion of aid as it applies to non-fiscal cases, and due to the political sensitivity of taxation as an area of exclusive Member State competence. Furthermore, the examination of the notion of fiscal aid and its limits allows for a critical analysis of the Commission's investigations into aggressive tax planning via tax rulings. The tax ruling Decisions have several problematic elements, which can only be fully appraised in the context of the notion of fiscal aid, as it emerges from the CJEU's case law.

Part I of the thesis examines the individual criteria of Article 107(1) TFEU that make up the notion of aid, as well as the compatibility regime applicable to fiscal State aid. That regime is the first to be examined, and it is shown that fiscal aid measures have to overcome more hurdles to be deemed compatible with the internal market when compared with non-fiscal ones. With the limited compatibility of fiscal aids established, the thesis moves on to examine the conditions of fiscal aid. This analysis starts with the notion of selectivity, which is generally considered to be the most relevant one in fiscal cases. The analysis of the notion and of the test employed, showcases a consistent widening of fiscal selectivity, which can lead to general measures falling within the scope of the State aid prohibition. The problems stemming from the determination of the reference framework and the comparability exercise are discussed in this context. Then, the notion of advantage as it applies to fiscal cases is discussed. It is shown that the MEOP cannot be readily applied to fiscal cases due to its internal logic, reducing the advantage analysis in fiscal cases to a bare-bones version of the selectivity analysis. However, the evidential burden attached to the notion of advantage also demonstrates the importance of the fiscal context in which a measure is to be assessed. The following Chapter discusses the remaining three criteria, namely the granting of aid through State resources, and the quasi-jurisdictional criteria of effect on trade and distortion of competition. It is shown that due to the State resources criterion's inherent logic its relevance is limited in fiscal cases, while it is also demonstrated that the two quasi-jurisdictional criteria are almost always satisfied, especially in fiscal cases. Thus, Part I of this thesis demonstrates that selectivity is the crux of the fiscal aid analysis, despite the practical importance of advantage, and that the widening of fiscal selectivity in effect translates into a widening of the notion of fiscal aid.

Based on the findings of Part I, Part II discusses the State aid tax ruling Decisions. The relevant fiscal concepts, in particular tax rulings, transfer pricing, and the arm's length principle (ALP) are discussed, alongside the factual patterns and basic reasoning of the Decisions. This allows for a critical analysis of the Decisions in their fiscal context, through which it is demonstrated that the invention of an EU

ALP is problematic on multiple fronts, from the creation of legal uncertainty to the limitation of Member States' fiscal sovereignty. It is also shown that the definition of the reference framework, and the combination of selectivity and advantage criteria are equally problematic. It is also shown that the problems in the reasoning of the tax ruling Decisions can to an extent be traced back to the problems that exist in the notion of fiscal aid. Based on Parts I and II, the thesis concludes that the core problem with the notion of fiscal State aid is the definition of selectivity and its limits, as it is in effect the only analytically substantive criterion. It is shown that its excessive widening can limit fiscal sovereignty, and can lead to radically novel concepts, like the EU ALP. As a result, the adoption of a more fiscal outlook is advocated for the entirety of the notion of fiscal aid, and specifically the criteria of selectivity and advantage.

Lay Summary

Being part of EU Competition law, State aid law is focused on ensuring fair and equal market conditions. State aid law deals with subsidies, understood in a broad manner, offered by Member States, and prohibits their being granted unless they meet certain criteria that ensure that the market is not distorted. The State aid prohibition, being part of the EU Treaties, applies to all aspects of a Member State's economy and to all measures they adopt. This means that it necessarily applies to taxation as well. Aid that takes the form of tax benefits and is granted through the tax system is known as fiscal State aid, and is the focus of this thesis. Fiscal aid effectively is a prohibition of measures that selectively grant, through State resources, a fiscal advantage that affects trade and distorts competition. In this sense, it can be broadly understood as a prohibition on discriminatory taxation. Fiscal State aid rules, due to their subject matter, can limit Member States' powers to use their tax system to pursue varied policy objectives, as national tax rules must be in line with the State aid prohibition. This can be demonstrated by the European Commission's recent investigations and Decisions, under the lens of State aid, into tax deals, known as tax rulings, struck between Member States and multinational enterprises like Apple or Starbucks. Thus, fiscal State aid is a sensitive topic, as under EU law Member States generally have the power to design their tax systems as they see fit. As a result of the importance of fiscal State aid, and its uneasy relationship with the powers of Member States, this thesis examines the five conditions that make up the notion of State aid as they apply to fiscal cases, as those conditions define the scope of the fiscal State aid prohibition.

The thesis discusses and analyses the notion of fiscal aid, and identifies the main problems with it. In this context, it examines the scope of the State aid prohibition, and demonstrates why its increasing width is far from ideal. Following from this, the thesis analyses the reasoning of the tax ruling Decisions, and aims to explain how the reasoning behind those Decisions came to be. Part I of this thesis examines each of the five conditions, through the case law of the European Union's Court of Justice, in order to define the notion of fiscal State aid. The analysis of the conditions of fiscal aid shows that due to either the conditions' internal logic or to the peculiarities of taxation, the only truly relevant conditions for fiscal aid are selectivity and advantage. This Part illustrates the difference between fiscal and non-fiscal aid, and demonstrates that the scope of fiscal aid has been considerably widened, as a result of a wide concept of selectivity. Part I therefore shows that the notion of fiscal aid is problematic, and its width is such as to threaten Member States' powers to define and implement their own tax systems. Thereafter, Part II examines the tax ruling Decisions. It starts by analysing principles of tax law that inform the fiscal context of the Decisions and the concepts with which they deal, such as tax rulings and the arm's length principle (ALP), before discussing and critiquing the

reasoning employed in the Decisions. The analysis illustrates that the reasoning is flawed, implying the existence of an EU-wide ALP, and potentially creating new limitations to the powers of Member States to create and manage their own tax regimes. Additionally, it is demonstrated that the problems stemming from the width of the notion of selectivity and fiscal aid in general can lead to the novel reasoning employed by the Commission in the tax ruling Decisions. Part II therefore identifies the problems with the notion of fiscal aid through some high-profile cases which are very innovative in their reasoning and can help lay bare those problems. Overall, the thesis illustrates the problems that exist in relation to the notion and scope of fiscal aid.

Table of Abbreviations

AG	Advocate General
ALP	Arm's Length Principle
APA	Advance Pricing Agreement
ATAD	Anti Tax Avoidance Directive
BEPS	Base Erosion and Profit Shifting
CCCTB	Common Consolidated Corporate Tax Base
CFC	Controlled Foreign Company
CJEU	Court of Justice of the European Union
CUP	Comparable Uncontrolled Price
D/NI	Deduction/Non-inclusion
DD	Double Deduction
DTC	Double Tax Convention
ECJ	European Court of Justice
EGC	European General Court
GBER	General Block Exemption Regulation
JTPF	Joint Transfer Pricing Forum
MEO	Market Economy Operator
MEOP	Market Economy Operator Principle
MNE	Multinational Enterprise
OECD	Organisation for Economic Co-operation and Development
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TNMM	Transactional Net Margin Method
TP	Transfer Pricing
VAT	Value Added Tax

Introduction

This thesis will examine the notion of fiscal State aid, and, based on that analysis, will discuss and critically evaluate the Commission's tax ruling State aid Decisions. The main focus of Part I is the notion of fiscal aid and by extension the scope of the State aid prohibition as applied to fiscal cases. Due to the differences between fiscal and non-fiscal aid, the scope will be shown to be wider in relation to the former. The problems caused by this wide formulation and the overall lack of clarity which permeates the notion of fiscal aid (as well as its application) will be demonstrated in Part II via the tax ruling Decisions. Placed in their fiscal context, those Decisions and their rationale will be analysed, and it will be shown that they represent at the same time both a new type of threat to fiscal sovereignty, and a logical extension of the (problematic) notion of fiscal aid.

The scope, as well the very notion of fiscal aid, are effectively defined by the five cumulative criteria of aid,[1] and their application to fiscal cases. Part I of this thesis will analyse each of the five conditions: selectivity, advantage, the use of State resources, the distortion of competition, and the measure's effect on trade. Through this analysis, focusing primarily on the interpretation of the individual conditions as it emerges from the CJEU's case law, this thesis will set out the notion of fiscal aid, and examine its scope. Additionally, it will be shown that fiscal State aid is different from non-fiscal aid, due to the inherent logic of some of the conditions, and as a result of the peculiarities of taxation itself. This can be further evidenced by the compatibility regime, which will also be discussed in Part I. The combined reading of the notion of fiscal aid and its scope on the one hand, and of the compatibility of fiscal aid on the other, will allow for an actual appraisal of the flexibility afforded to Member States to pursue policy aims through their tax systems. This is because, in effect, the notion and scope of State aid inform the limits of State aid control, i.e. what measures are prohibited, while the compatibility regime reflects State aid policy, by demonstrating to what extent a prohibited measure can be allowed to exist within the internal market. This Part of the thesis will set off with a brief overview of the compatibility regime, in order to demonstrate some of the differences between "standard" and fiscal aid, and in order to contextualise the importance of the scope of the aid prohibition. Following this, the thesis will aim to demonstrate the central role that the notion of selectivity has traditionally played, and still plays, in the analysis of fiscal State aid. In this context, the increasing width and evolution of this criterion will be examined, as the scope of fiscal aid depends primarily on the interpretation of fiscal selectivity. At the same time, the evolution of the notion of advantage into an increasingly substantive concept will be discussed. Finally, the other three criteria will be examined, and it will be shown that while they can be

[1] Joined Cases C-278/92, C-279/92, and C-280/92 *Spain v Commission* ECLI:EU:C:1994:325, para 20; Case C-482/99 *France v Commission* ECLI:EU:C:2002:294, para 68

situationally very relevant in fiscal cases, in general they tend to be almost automatically satisfied.

Following the analysis of the notion of fiscal aid and its scope in Part I, Part II of the thesis will move on to examine the recent tax ruling Decisions adopted by the Commission. The Commission decided to use its substantial investigatory powers in relation to State aid to examine a number of tax rulings issued by the tax authorities of Member States to (large) MNEs. In effect, the Commission was not convinced that the arrangements endorsed in those rulings reflected market conditions, which in relation to advanced pricing agreements (APAs) practically means that the arrangements were not in line with the arm's length principle (ALP). It becomes clear that those Decisions revolve around complicated elements of international taxation, such as tax rulings, mismatches, and most importantly transfer pricing (TP) and the ALP. Thus, Part II will first contextualise the analysis of those Decisions by discussing the relevant elements of the international tax regime. Then, very briefly, the factual patterns of the cases and the rationale employed by the Commission will be outlined. Building on those two aspects of the Decisions and their context, it will be possible to critically evaluate the problematic elements that stem from the rationale of those Decisions. It is clear that the Commission's reasoning is rather innovative,[2] while at the same time it endorses and jumps off from some general problematic elements of the notion of fiscal aid. In effect, the Commission's bold foray into new territory suffers from wholly novel problems, which to an extent can be traced back to the notion of fiscal selectivity. At the same time, some long existing analytical problems, such as the width of the reference framework employed for the selectivity analysis, are also part of the reasoning of the Decisions. As such, the critical analysis of the tax ruling Decisions can serve to showcase, *inter alia*, the potential negative effects of an excessively wide conception of fiscal selectivity, especially in relation to the concept of fiscal sovereignty. The Decisions can serve both as an example and as a cautionary tale. In brief, Part II will start by examining the elements of the international tax regime that inform the Decisions, alongside the facts and reasoning that gave rise to those Decisions. Following from this, it will aim to demonstrate the issues that follow from the Commission's and the General Court's rationale, focusing on the truly innovative elements and tying them back to the general discussion of Part I.

State aid relating to taxation, or fiscal State aid, has always been a somewhat contentious political issue.[3] The rules on State aid are contained in Articles 107 to 109 TFEU. As such, they are part of Chapter 1 of Title VII, on the rules on

[2] See for example: Saturnina Moreno Gonzalez, 'State Aid and Tax Competition: Comments on the European Commission's Decisions on Transfer Pricing Rulings' (2016) 15 European State Aid Law Quarterly 556, 558-563

[3] See for example: Cees Peters, 'Tax Policy Convergence and EU Fiscal State Aid Control: In search of Rationality' (2019) 28 EC Tax Review 6

competition. The State aid prohibition, contained in Article 107(1) TFEU, prohibits the granting of, widely construed, subsidies by Member States to undertakings, while Articles 107(2) and (3) contain exemptions rendering aid compatible with the internal market. Article 108 and 109 contain the rules that make up the implementation regime of State aid, from the Commission's powers and obligations, to mechanisms enabling the adoption of regulations.

Fiscal aid can be a contentious issue because, in principle, Member States enjoy exclusive competence when it comes to direct taxation, as a result of the principle of conferral,[4] and the allocation of competences that follows from it. At the same time, the Commission has the dual role of promoting the interests of the EU while also overseeing the application of the Treaties and of Union law in general.[5] In the field of competition law, the Union (and by extension the Commission) has exclusive competence.[6] This creates an obvious tension, as due to the effects-based conception of State aid and the fact that it is wider as a concept than a direct subsidy, the rules on State aid, which form part of the competition law apparatus, can apply to fiscal cases.[7] This results on the one hand from the fact that State aid is part of competition law, and on the other from the fact that the Member States' fiscal sovereignty is not absolute. Rather, they have the competence to design their own direct tax system as they please as long as they consistently exercise that competence in line with Union law,[8] which of course includes the provisions on State aid. However, in relation to State aid, the legal extensions of this position are not necessarily clear.[9] In short, the Commission is charged with implementing the (fiscal) State aid regime, while also having a degree of control over State aid policy,[10] and being involved with (positive) tax harmonisation.[11] Even in its role as the guardian of the State aid prohibition and its associated compatibility analysis, the Commission

[4] Treaty on European Union (TEU), Articles 4(1), 5(1), 5(2)
[5] Giorgio Monti, 'Independence, Interdependence, and Legitimacy' in D Ritleng (ed) *Independence and Legitimacy in the Institutional System of the European Union* (OUP 2016), 190
[6] Treaty on the Functioning of the European Union (TFEU), Article 3(1)(b)
[7] Case 30/59 *De gezamenlijke Steenkolenmijnen in Limburg v High Authority* ECLI:EU:C:1961:2, p 19; Case 173/73 *Italy v Commission* ECLI:EU:C:1974:71, para 13
[8] Case C-279/93 *Finanzamt Köln-Altstadt v Roland Schumacker* ECLI:EU:C:1995:31, para 21; Case C-157/10 *Banco Bilbao Vizcaya Argentaria SA v Administración General del Estado* ECLI:EU:C:2011:813, para 28;Case C-287/10 *Tankreederei I SA v Directeur de l'administration des contributions directes* ECLI:EU:C:2010:827, para 14
[9] See for example: Case C-449/14 P *DTS Distribuidora de Televisión Digital v Commission* ECLI:EU:C:2016:848, paras 65, 83; H Brokelmann and M Ganino, 'DTS v Commission: When is a Tax Measure State Aid?' (2017) 8 Journal of European Competition Law and Practice 102, 103
[10] Michael Blauberger, 'Of 'Good' and 'Bad' Subsidies: European State Aid Control through Soft and Hard Law' (2009) 32 West European Politics 719, 720-725
[11] See for example: Proposal for a Council Directive on a Common Corporate Tax Base {SWD(2016) 341}{SWD(2016) 342}, COM(2016) 683 final, 2016/0336 (CNS) 25.10.2016, p. 2; Proposal for a Council Directive on a Common Corporate Tax Base {SWD(2016) 341}{SWD(2016) 342}, COM(2016) 685 final, 2016/0337 (CNS) 25.10.2016, p. 2. See also: Christiana HJI Panayi, *European Union Corporate Tax Law* (Cambridge University Press 2013), 3-30, especially parts 1.2.1 – 1.3.4

has arguably the power to influence the scope of the notion of aid.[12] Thus, despite the fiscal sovereignty of Member States, it is clear that fiscal convergence can be achieved through State aid.[13] It is equally clear that fiscal sovereignty only goes so far, as it must constantly and consistently be exercised in line with the Member States' obligations under EU law. Given that the Commission has a monopoly on the assessment of State aid and the enforcement of State aid rules and needs to ensure its effectiveness,[14] the conflict with direct taxation requires a careful and delicate balancing act.[15] In this context, the Commission initiated a series of investigations into the tax arrangements of a number of high-profile MNEs, examining those arrangements under the lens of State aid law.

Given the uneasy relationship at the meeting point of two conflicting exclusive competences, it is important to examine the scope of fiscal State aid, and its effect on Member States' fiscal powers. This thesis overall will demonstrate that the notion of fiscal selectivity, when read in conjunction with the compatibility regime, shows that Member States have very limited room to manoeuvre when it comes to pursuing policy objectives through their tax systems. This is not *per se* problematic, but the scope of the State aid prohibition matters in this context. That scope can only become apparent based on the interpretation of the constituent elements of the notion of aid, which in effect describe it and endow it with content. This is especially true as the conception of the conditions in fiscal cases is somewhat different when compared to non-fiscal aid. From this platform, it becomes possible to critically evaluate the tax ruling Decisions, and their "test case" character.[16] This combined discussion, looking at the notion of fiscal aid and its application to the tax ruling cases, can help illuminate the limits of the notion of fiscal aid. Additionally, it will show that the innovative, and controversial,[17] elements of the tax ruling Decisions were made possible primarily as a result of the problems with the notion of fiscal aid. Thus, the discussion of the notion of fiscal aid, and that of the tax ruling cases come together to demonstrate the problematic elements within the notion of fiscal aid, and the extent to which those elements can alter the scope of fiscal aid, and potentially curtail the fiscal sovereignty of Member States.

This thesis states the law as at 1 October 2020.

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[12] Philipp Werner, 'Article 108 TFEU' in F J Säcker and F Montag (eds) *European State Aid Law* (Beck Hart Nomos 2016), para 42

[13] Peters (n 3), 9

[14] See for example: Francisco De Cecco, *State Aid and the European Economic Constitution* (Hart Publishing 2013), 96

[15] Thomas J Doleys, 'Managing the Dilemma of Discretion: The European Commission and the Development of EU State Aid Policy' (2013) 13 Journal of Industry, Competition and Trade 23, 24

[16] Thomas Jaeger, 'Tax Concessions for Multinationals: In or Out of the Reach of State Aid Law?' (2017) 8 Journal of European Competition Law and Practice 221, 228-229

[17] Peter J Wattel, 'Stateless Income, State Aid and the (Which?) Arm's Length Principle' (2016) 44 INTERTAX 791, 792

Part I

This Part sets out the differences between fiscal State aid and non-fiscal aid. First, it deals with the compatibility of fiscal aids with the Internal Market and on that basis addresses the notion of fiscal aid. Each of the five cumulative criteria of aid are analysed in respect of fiscal cases. The notion of selectivity and the approach of the Court of Justice toward the concept of advantage will be especially considered. This Part will illustrate the fundamental problems with the notion of fiscal aid, focusing on the very wide (and ever-expanding) notion of selectivity and therefore fiscal aid. This, combined with the compatibility regime which makes fiscal aid very unlikely to be deemed compatible, and with the relative lack of influence of the remaining criteria on the scope of fiscal aid, demonstrates the core problem with the notion of fiscal aid.

Compatibility of Fiscal State aid with the Internal Market

I. Introduction

The focus of this thesis is Article 107(1) TFEU, which contains the general State aid prohibition, based on the cumulative[1] criteria which will be analysed in the following Chapters. However, before analysing the notion of fiscal aid, it is necessary to briefly consider the State aid compatibility regime. The prohibition of State aid is not absolute, and therefore the possibility exists for fiscal policy which infringes the prohibition to be deemed compatible with the internal market. The Commission enjoys a central role in the compatibility regime, and is endowed with a wide array of powers. This Chapter will focus on the compatibility regime as it applies to fiscal aids, which as will be shown, is different to the one applicable to non-fiscal aids. This Chapter does not aim to offer a comprehensive account or critique of the compatibility regime and the State aid policy that informs it, but rather it will showcase the hurdles that fiscal aid has to overcome to be deemed compatible. This discussion's purpose is to contextualise the discussion in the following Chapters as it relates to the limitations on fiscal sovereignty that stem from the fiscal aid regime, and to the practical problems stemming from the wide scope of the fiscal aid prohibition.

II. The Compatibility Regime

a. General Principles

Article 107(1) states that State aid shall be incompatible with the internal market and therefore prohibited "save as otherwise provided in the Treaties". Based on the scheme of Article 107, the State aid prohibition is neither absolute nor unconditional.[2] Nonetheless, the concept of State aid cannot be altered or affected by the Commission or the Council.[3] The aid character of a measure is thus not negated by its compatibility.[4] All derogations from a general rule need to be construed narrowly, which naturally applies to the derogations applicable to Article

[1] Case C-142/87 *Belgium v Commission* ECLI:EU:C:1990:125, para 25; Joined cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* ECLI:EU:C:1994:325, para 20; Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* ECLI:EU:C:2003:415, para 74

[2] Case 78/76 *Steinke und Weinlig v Germany* ECLI:EU:C:1977:52, para 8; Case C-39/94 *SFEI and others v La Poste and others* ECLI:EU:C:1996:285, para 36

[3] Case C-71/04 *Administración del Estado v Xunta de Galicia* ECLI:EU:C:2005:493, para 37

[4] Case 248/84 *Germany v Commission* Opinion of AG Darmon ECLI:EU:C:1986:487, para 4

107(1) TFEU.[5] Therefore, as a general rule, once a measure is classified as aid it is necessary to establish if any exemption applies to the aid in question.[6]

The second and third paragraphs of Article 107 TFEU contain two sets of legal exemptions. Each of those sub-paragraphs contains conditions, that, if met, can make the contested aid compatible with the internal market. Additionally, under Article 108(2) TFEU the Council can, in exceptional circumstances,[7] and subject to certain conditions,[8] decide that aid which does not benefit from any of the existing derogations, is compatible with the internal market. Beyond the exemptions provided for in the Treaty, under Article 108(4) the Commission can adopt regulations that remove the notification obligation under Article 108(3) for the certain categories of aid, essentially, treating the aid as compatible with the internal market.[9] The current Enabling Regulation, Council Regulation No 1588/2015,[10] as amended by Council Regulation 2018/1911,[11] confers on the Commission a considerable array of powers,[12] allowing the Commission to adopt Block Exemption Regulations. The purpose of the GBER is to declare individual aid or aid schemes compatible with the internal market, as long as the conditions, both general and specific, laid down in the Regulation are met.[13] Additionally, the Commission has

[5] Case C-156/98 *Germany v Commission* ECLI:EU:C:2000:467, para 49; Case C-334/99 *Germany v Commission* ECLI:EU:C:2003:55, para 117; Case C-277/00 *Germany v Commission* ECLI:EU:C:2004:238, para 20; Case C-278/00 *Greece v Commission* ECLI:EU:C:2004:239, para 81; Case C-73/03 *Spain v Commission* ECLI:EU:C:2004:711, para 36; Joined Cases C-346/03 and C-529/03 *Giuseppe Atzeni and Others and, Marco Scalas and Renato Lilliu v Regione autonoma della Sardegna* ECLI:EU:C:2006:130, para 79

[6] Case 730/79 *Philip Morris Holland BV v Commission* ECLI:EU:C:1980:209, para 18

[7] Case C-110/02 *Commission v Council* ECLI:EU:C:2004:395, para 30

[8] Case C-122/94 *Commission v Council* ECLI:EU:C:1996:68, paras 19-21; Case C-111/10 *Commission v Council* ECLI:EU:C:2013:785, para 98; Case C-122/94 *Commission v Council* Opinion of AG Cosmas ECLI:EU:C:1995:395, para 64. See also: Case 253/84 *Groupement agricole d'exploitation en commun (GAEC) de la Ségaude v Council and Commission* ECLI:EU:C:1987:9; Christoph Arhold, Viktor Kreuschitz, Franz Jürgen Säcker, Ulrich Soltesz, Michael Shuette, Andreas Schwab, 'Article 107 TFEU' in F J Säcker and F Montag (eds) *European State Aid Law* (Beck Hart Nomos 2016), para 549; Conor Quigley, *European State Aid Law and Policy* (3rd edn, Hart Publishing 2015), 218

[9] Ramona Ianus 'Aid Exempted from Notification to the Commission: The General Block Exemption Regulation (GBER)' in H Hofmann and C Micheau (eds) *State Aid Law of the European Union* (OUP 2016), 325

[10] Council Regulation (EC) No 1588/2015 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State Aid [2015] OJ L 248/1

[11] Council Regulation (EU) 2018/1911 of 26 November 2018 amending Regulation (EU) 2015/1588 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State Aid [2018] OJ L 311/8

[12] Herwig Hoffman, 'The Legal Framework to Subsidies and State Aid Review' in H Hofmann and C Micheau (eds) *State Aid Law of the European Union* (OUP 2016), 48

[13] See in general: Commission Regulation (EU) N°651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L 187/1, , as amended by Commission Regulation (EU) 2017/1084 of 14 June 2017 amending Regulation (EU) No 651/2014 as regards aid for port and airport infrastructure, notification

through the years adopted several *De minimis* regulations to deal with small quantities of aid.[14]

Beyond the conditions found in the derogations contained in Article 107, a requirement of necessity, which is often analysed as "incentive effect",[15] also needs to be examined by the Commission.[16] Necessity in this context means that aid can be compatible with the internal market to the extent that it is necessary for the attainment of the objective specified in the derogation.[17] This also follows from the wording and structure of Article 107. As such, aid which is not necessary to meet one of the compatibility objectives cannot itself be compatible with the internal market.[18] This concept, simple as it may appear, to an extent requires an examination of the recipient's subjective state of mind. To facilitate this analysis, a condition, substantive rather than formalistic,[19] that the aid application be made before works on the project begin has been used;[20] if such work has begun, then the aid lacks incentive effect. However, other criteria can apply to establish the existence of an incentive effect,[21] depending on the circumstances of the case. Nonetheless, aid which simply improves the financial situation of the recipient cannot be allowed.[22] Additionally, where an undertaking is obliged to carry out an activity, aid to it in relation to that activity lacks incentive effect.[23]

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thresholds for aid for culture and heritage conservation and for aid for sport and multifunctional recreational infrastructures, and regional operating aid schemes for outermost regions and amending Regulation (EU) No 702/2014 as regards the calculation of eligible costs [2017] OJ L 156/1.

[14] *De minimis* aid escapes State Aid control not by being compatible with the internal market, but by being deemed to not affect trade and to not distort or threaten to distort competition, and thus not qualifying as aid for the purposes of Article 107(1) TFEU.

[15] The two terms are interchangeable. See: Phedon Nicolaides, 'Incentive Effect: Is State Aid Necessary When Investment Is Unnecessary' (2008) 7 European State Aid Law Quarterly 230, 231.

[16] Case C-390/06 *Nuova Agricast Srl v Ministero delle Attività Produttive* ECLI:EU:C:2008:224, para 68; Case C-129/12 *Magdeburger Mühlenwerke GmbH v Finanzamt Magdeburg* ECLI:EU:C:2013:200, para 45; Case C-544/09 P *Germany v Commission* ECLI:EU:C:2011:584, para 68

[17] *Philip Morris* (n 6), paras 16-17; Case 74/76 *Iannelli & Volpi SpA v Ditta Paolo Meroni* ECLI:EU:C:1977:51, para 15

[18] *Nuova Agricast* (n 16), para 68; Case C-459/10 P *Freistaat Sachsen and Land Sachsen-Anhalt v Commission* ECLI:EU:C:2011:515, para 36; Joined Cases C-630/11 P, C-631/11 P, C-632/11 P, and C-633/11 P *HGA Srl and Others, Regione autonoma della Sardegna, Timsas srl, and Grand Hotel Abi d'Oru SpA v Commission* ECLI:EU:C:2013:387, para 104

[19] Case C-349/17 *Eesti Pagar AS v Ettevõtluse Arendamise Sihtasutus and Majandus- ja Kommunikatsiooniministeerium* Opinion of AG Wathelet ECLI:EU:C:2018:768, paras 83, 89, 91, 101

[20] *Nuova Agricast* (n 16), para 69; Case C-349/17 *Eesti Pagar AS v Ettevõtluse Arendamise Sihtasutus and Majandus- ja Kommunikatsiooniministeerium* ECLI:EU:C:2019:172, paras 62-64, 72; *HGA* (n 18), para 106

[21] *HGA* (n 18), paras 106-110

[22] *Ibidem,* para 104

[23] Nicolaides (n 15), 235

In relation to Article 107(3), proportionality also needs to be analysed.[24] It is worth noting that conceptually the notion of incentive effect is closely linked to proportionality, as the amount of aid that is appropriate and therefore proportional will be deemed to correspond precisely to the amount necessary to create an incentive effect.[25] As such, appropriateness and necessity are not always easy to separate. Another condition applicable to all compatibility analyses is that the aid measure cannot violate other Treaty provisions,[26] especially if the parts of the measure violating other Treaty provisions are "indissolubly" linked to the objective of the aid.[27] An authorised State aid measure can under no circumstances produce results contrary to specific provisions of the Treaties.[28] The legal exemptions contained in Article 107, and the definitions of the relevant terms within the derogations, must be interpreted restrictively.[29] Finally, the aid in question has to have a sufficiently close link to the objective of the derogation.[30]

Based on the logic of the concept of necessity, operating aid cannot in principle have an incentive effect, since it comes with no conditions attached to it,[31] and simply covers operating expenses,[32] as opposed to investments. Thus, operating aid cannot in general be allowed under the exemptions contained in Article 107.[33] This is particularly relevant for fiscal aid, as most fiscal measures tend to grant operating aid.[34] However, under the General Block Exemption Regulation (GBER) operating aid can be allowed in certain instances,[35] for example in relation to cultural and heritage conservation, or aid to SMEs. It is worth noting in this context that the requirements laid out in the GBER for the granting of fiscal aid are

[24] Joined cases T-126/96 and T-127/96 *Breda Fucine Meridionali SpA (BFM) and Ente partecipazioni e finanziamento industria manifatturiera (EFIM) v Commission* ECLI:EU:T:1998:207, para 101
[25] Case C-654/17 P *Bayerische Motoren Werke AG and Freistaat Sachsen v Commission* ECLI:EU:C:2019:634, para 88
[26] Case C-156/98 *Germany v Commission* (n 5), para 78; Case C-204/97 *Portugal v Commission* ECLI:EU:C:2001:233, para 41
[27] Case C-225/91 *Matra SA v Commission* ECLI:EU:C:1993:239, para 41
[28] Case 73/79 *Italy v Commission* ECLI:EU:C:1980:129, para 11
[29] See for example: Case C-156/98 *Germany v Commission* (n 5), para 52; Case T-8/06 *FAB Fernsehen aus Berlin GmbH v Commission* ECLI:EU:T:2009:386, paras 87-89
[30] C-71/09 P, C-73/09 P and C-76/09 P *Comitato «Venezia vuole vivere», Hotel Cipriani Srl, and Società Italiana per il gas SpA (Italgas) v Commission* ECLI:EU:C:2011:368, para 170
[31] Case C-86/89 *Italy v Commission* ECLI:EU:C:1990:373, para 18
[32] Case C-278/95 P *Siemens SA v Commission* ECLI:EU:C:1997:240, para 37; Case C-458/09 P *Italy v Commission* ECLI:EU:C:2011:769, para 63
[33] Joined Cases 62/87 and 72/87 *Exécutif Régional Wallon and SA Glaverbel v Commission* ECLI:EU:C:1988:132, para 29; *Italy v Commission* (n 31), para 18; Case C-288/96 *Germany v Commission* ECLI:EU:C:2000:537, para 90; *Freistaat Sachsen* (n 18), paras 33-34. See also: Commission Decision 2003/81/EC of 22 August 2002 on the aid scheme implemented by Spain in favour of coordination centres in Vizcaya C 48/2001 (ex NN 43/2000) [2003] OJ L31/26, recital 39. See however: Case 323/82 *Intermills v Commission* ECLI:EU:C:1984:345, para 39
[34] Thomas Jaeger, 'Tax Measures' in F J Säcker and F Montag (eds) *European State Aid Law* (Beck Hart Nomos 2016), para 93
[35] Commission Regulation N°651/2014 (n 13), Articles 1(1)(b), 6(5)(a), 15, 27, 42, 43, 53, 55(7)(b), 56a(2)

somewhat different to those applicable to "normal" State aid.[36] This creates a different burden (and framework) for the granting of fiscal aid, even in the context of the instances where operating aid is permissible. Outside those instances, even under the GBER, fiscal aid needs to have an incentive effect. Specifically, under Article 6(4), the incentive effect of fiscal aid can be established if the measure is based on objective criteria which leave no discretion to the authorities of the granting State, and if the measure comes into force before work on the aided project or activity starts.[37] The *ex ante* nature of the GBER also makes the granting of fiscal aid more complex, both in terms of meeting the conditions, and in terms of administering and monitoring the aid regime.

It is clear therefore that when it comes to the general principles of compatibility, fiscal aid is somewhat different than non-fiscal aid. Even though it is not impossible for (operating) fiscal aid to be deemed compatible with the internal market, the need for an incentive effect to exist under all available derogations can be problematic for such aid.[38] The compatibility issues that fiscal aid faces, when read in conjunction with the fiscal aid regime under Article 107(1) TFEU, show that Member States can effectively make very limited use of their fiscal powers for policy purposes, as if they step outside the narrow prescriptions of the compatibility regime, it is likely that a fiscal measure will be deemed to be aid incompatible with the internal market.

b. The Commission's Role and Powers

At this point, it is necessary to briefly set out the Commission's role in the compatibility analysis, as it informs the structure of the entire system. The first sentence of Article 108(3) TFEU provides for a notification obligation, which means that a Member State wishing to grant new aid or alter an existing aid measure has to inform the Commission, so it can investigate its compatibility with the internal market.[39] This obligation has direct effect, and can be enforced by national courts.[40] Additionally, there is a standstill obligation, meaning that Member States shall not go forward with the notified aid until the Commission has reached a final decision.[41]

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[36] See: *Ibidem,* Articles 5(2)(f), 6(4), 9(2), 12(2)

[37] *Ibidem,* Article 6(4)

[38] See also in this context: Case C-301/87 *France v Commission* ECLI:EU:C:1990:67, para 44; Case C-172/03 *Wolfgang Heiser v Finanzamt Innsbruck* ECLI:EU:C:2005:130, para 55; Case C-496/06 P *Commission v Italy and Wam SpA* ECLI:EU:C:2009:272, para 54

[39] Joined cases C-442/03 P and C-471/03 P *P & O European Ferries (Vizcaya) SA and Diputación Foral de Vizcaya v Commission* ECLI:EU:C:2006:356, paras 103-105

[40] Joined cases C-261/01 and C-262/01 *Belgische Staat v Eugène van Calster and Felix Cleeren and Openbaar Slachthuis NV* ECLI:EU:C:2003:571, para 53; Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v France* ECLI:EU:C:1991:440, para 12; Case C-17/91 *Georges Lornoy en Zonen NV and others v Belgium* ECLI:EU:C:1992:514, para 30

[41] TFEU, Article 108(3); Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L 248/9, Articles 2, 3

These notification and standstill obligations only apply to measures that are actually aid.[42] The Member State concerned should refer to a specific exemption when notifying aid to the Commission, as the Commission has to refer specifically to the exemption employed in its Decisions.[43] However, aid measures that fall within the scope of the *De minimis* or Block Exemption Regulations do not need to be notified to the Commission.[44] Aid granted in contravention of Article 108(3) is deemed to be unlawful aid.[45] Even when aid is granted pursuant to Council authorisation under a Council Directive, it still needs to be notified.[46] The Commission's central role, and by extension the notification and standstill obligation result from the fact that not notifying aid is deemed as preventing the Commission from exercising its exclusive competence.[47]

The Commission initiates a "preliminary examination", where it can conclude that the measure notified is not actually aid,[48] that the measure is aid but it is compatible with the internal market,[49] or that there are doubts as to the compatibility of the measure with the internal market, necessitating a formal investigation procedure.[50] In the preliminary examination the Commission cannot adopt a negative decision. The formal investigation procedure is based on Article 108(2), and can also be applied to proposed aid measures that have not yet been introduced, in line with the standstill obligation. Under Article 6(1) of the Procedural Regulation the Commission must issue a Decision to initiate the formal investigation, known as an opening decision. The Commission can reach a Decision that the measure is not aid within the meaning of Article 107(1) TFEU. If the measure is indeed aid, the Commission can reach a positive Decision, finding the measure compatible with the internal market, a conditional Decision, or a negative Decision finding the measure incompatible.[51] The same process applies to unlawful aid. When the Commission reaches its final Decision, said Decision must comply with

[42] Case C-345/02 *Pearle BV, Hans Prijs Optiek Franchise BV and Rinck Opticiëns BV v Hoofdbedrijfschap Ambachten* ECLI:EU:C:2004:448, para 31
[43] Council Regulation 2015/1589 (n 41), Articles 4(3) and 9(3)
[44] Council Regulation 2015/1588 (n 10) as amended by Council Regulation 2018/1911 (n 11), Articles 1, 2.
[45] Council Regulation 2015/1589 (n 41), Article 1(f)
[46] Case C-272/12 P C*ommission v Ireland and Others* ECLI:EU:C:2013:812, paras 49-53
[47] *Ibidem,* para 49
[48] Council Regulation 2015/1589 (n 41)*,* Article 4(2)
[49] *Ibidem,* Article 4(3). This is known as a "Decision not to raise objections". See also in this context: Philipp Werner, 'Article 108 TFEU' in F J Säcker and F Montag (eds) *European State Aid Law* (Beck Hart Nomos 2016), para 42
[50] Council Regulation 2015/1589 (n 41)*,* Article 4(4)
[51] *Ibidem,* Article 9(2), (3), (4), and (5)

the obligation to state reasons under the second paragraph of Article 296 TFEU,[52] separate from the merits of those reasons.[53]

Thus, the Commission is clearly the most central and important actor in any compatibility analysis,[54] and due to its enforcement monopoly, the central actor in the assessment of aid measures in general. Kreuschitz explains that the monitoring of the TFEU's State aid provisions falls on the Commission, due to their common interests nature.[55] However, the Commission does not have an obligation to initiate a compatibility analysis, rather the Member State concerned has to invoke the compatibility of the contested aid.[56] This means that the burden of proof is on the Member States concerned, who have to provide the Commission with the relevant information.[57] Thus, judicial review is limited to establishing that the procedural rules have been followed, to verifying the accuracy of the facts, and on examining errors of law and manifest errors of assessment in relation to the facts and misuse of powers.[58] National courts have no jurisdiction to determine whether an aid measure is compatible with the internal market,[59] meaning that the Commission's competence is exclusive.

c. The Commission's Margin of Discretion

The Commission's discretion, and by extension its powers, differ depending on the derogation invoked. This is obvious from the language of Article 107 itself. In Article 107(2), the Treaty states that aid which falls within one of the sub-paragraphs "shall be" considered compatible with the internal market, while Article 107(3) uses the formulation "may be". In relation to Article 107(3), the Commission's

[52] Case C-367/95 P *Commission v Chambre syndicale nationale des entreprises de transport de fonds et valeurs (Sytraval) and Brink's France SARL* ECLI:EU:C:1998:154, para 63; Case C-56/93 *Belgium v Commission* ECLI:EU:C:1996:64, para 86; Case C-301/96 *Germany v Commission* ECLI:EU:C:2003:509, para 65

[53] Case C-159/01 *Netherlands v Commission* ECLI:EU:C:2004:246, para 65

[54] Case C-234/99 *Niels Nygård v Svineafgiftsfonden, and Ministeriet for Fødevarer, Landbrug og Fiskeri* ECLI:EU:C:2002:244, para 62; *Commission v Council* (n 7), para 29. See also: *Fédération Nationale* (n 40), para 9

[55] Arhold, Kreuschitz, Säcker, Soltesz, Shuette, (n 8), para 546

[56] Tim Maxian Rusche, 'General Theory of Compatibility of State Aid' in H Hofmann and C Micheau (eds) *State Aid Law of the European Union* (OUP 2016), 224

[57] *Ibidem*; Case C-364/90 *Italy v Commission* ECLI:EU:C:1993:157, para 20; Case T-68/03 *Olympiaki Aeroporia Ypiresies AE v Commission* ECLI:EU:T:2007:253, para 34; Case T-211/05 *Italy v Commission* ECLI:EU:T:2009:304, para 174; Case 730/79 *Philip Morris Holland BV v Commission* Opinion of AG Capotorti ECLI:EU:C:1980:160, para 6; *Germany v Commission* Opinion of AG Darmon (n 4), para 8. See also: Case C-372/97 *Italy v Commission* ECLI:EU:C:2004:234, paras 84-85

[58] Case C-372/97 *Italy v Commission* (n 57), para 83; Case C-351/98 *Spain v Commission* ECLI:EU:C:2002:530, para 74

[59] *Fédération Nationale* (n 40), para 14; *La Poste* (n 2), para 42; Case C-295/97 *Industrie Aeronautiche e Meccaniche Rinaldo Piaggio SpA v International Factors Italia SpA (Ifitalia), Dornier Luftfahrt GmbH and Ministero della Difesa* ECLI:EU:C:1999:313, para 31; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti Srl v Giuseppe Calafiori* ECLI:EU:C:2006:208, para 71

discretion is therefore wider than in relation to 107(2).[60] Judicial review of this discretion is limited,[61] as the Court is not allowed to substitute the Commission's analysis for its own.[62] Following from the Union's role in establishing the competition rules necessary for the functioning of the internal market, per Article 3(1)(b) TFEU, the Commission has to weigh the "beneficial effects of aid against its adverse effects",[63] making the wide margin of discretion necessary. This is materially different from the discretion relating to Article 107(2),[64] where the Commission's role is limited to verifying that the conditions of the invoked sub-paragraph are met.[65] Despite the width of Commission's margin of discretion, it is not allowed to disregard essential facts in its compatibility analysis.[66]

This wide margin of discretion extends to the block exemption regime. Through the GBER, the Commission is in essence exercising its wide discretion under Article 107(3) to establish the criteria, general and specific, that need to be met for aid to escape the notification process and be deemed compatible with the internal market.[67] However, the existence of the GBER and the exemption regime in general cannot deprive the Commission of this discretion.[68] It should be made clear that, as with the *de minimis* Regulation,[69] the Commission is bound by the GBER as long as it is in force.

The Commission also issues several soft law instruments. Through those, it essentially self-limits its wide discretion, by making the rules contained in those instruments part of its enforcement apparatus.[70] The Commission is bound by those rules to the extent that they do not contravene any Treaty rules,[71] and departing from those rules could result in the Commission breaching general principles of

[60] *France v Commission* (n 38), paras 15, 49. See also: *Philip Morris* (n 6), para 24; Case 310/85 *Deufil GmbH & Co. KG v Commission* ECLI:EU:C:1987:96, para 18
[61] Joined Cases C-75/05 P *Kronofrance SA v Germany and Others* and C-80/05 P *Glunz and OSB Deutschland v Kronofrance* ECLI:EU:C:2008:482, para 59
[62] Case C-456/00 *France v Commission* ECLI:EU:C:2002:753, para 41
[63] Joined cases T-371/94 and T-394/94 *British Airways plc, Scandinavian Airlines System Denmark-Norway-Sweden, Koninklijke Luchtvaart Maatschappij NV, Air UK Ltd, Euralair international, TAT European Airlines SA and British Midland Airways Ltd v Commission* ECLI:EU:T:1998:140, para 283
[64] *Philip Morris (n 6),* para 17
[65] Arhold, Kreuschitz, Säcker, Soltesz, Shuette, Schwab (n 8), para 520; Leigh Hancher, Tom Ottervanger, and Piet Jan Slot (eds) *EU State Aids* (Sweet & Maxwell 2012), para 20-042
[66] Joined cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek BV v Commission* ECLI:EU:C:1985:113, para 26
[67] Ianus (n 9), 325
[68] Case T-357/02 RENV *Freistaat Sachsen v Commission* ECLI:EU:T:2011:376, para 44
[69] Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *De minimis* aid [2013] OJ L 352/1
[70] *Kronofrance* (n 61), para 60; *Germany v Commission* (n 33), para 62
[71] Case C-91/01 *Italy v Commission* ECLI:EU:C:2004:244, para 91; Case C-409/00 *Spain v Commission* ECLI:EU:C:2003:92, para 95

Union law.[72] The Courts make it clear that such departures are not allowed,[73] and that observance of those rules is part of the judicial review process.[74] Bouchiagar argues, based on the Commission's exclusive competence, that, *de facto*, the soft law is also binding on Member States.[75] Rusche points to the legal value of the soft law instruments, claiming that the criteria contained therein mirror those of Article 107(2), meaning that the Commission's discretion is limited.[76] However, the ECJ has accepted that under exceptional circumstances, which should be understood as meaning circumstances different from those envisaged in the soft law instrument in question, the Commission may not be bound by said soft law.[77] Thus, the Commission has to observe its own soft law, and effectively limits its own wide discretion by not being allowed to depart from it, except in exceptional circumstances. As such, soft law instruments create legal effects,[78] and can thus be challenged.[79] Despite the obvious value of soft law instruments dealing with compatibility, both practically and legally, Kreuschitz observes that their importance is decreasing, due to the increasing use of block exemptions.[80]

d. Conclusion

This section has set out the basic structure of the State aid compatibility regime and has outlined the procedure that will be employed. Beyond this, it has been established that the Commission generally has a wide margin of discretion when assessing the compatibility of an aid measure, as well as complete power of the compatibility assessment process. It is clear that the Commission is the central character in the compatibility analysis. Additionally, the hard and soft law instruments it enacts in this area practically, if not theoretically, limit its discretion. Finally, it has been shown that there are several avenues for an aid measure to be deemed to be compatible with the internal market, but conditions such as the

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[72] Joined cases C-189/02 P, C-202/02 P, C-205/02 P, C-206/02 P, C-207/02 P, C-208/02 P, and C-213/02 P *Dansk Rørindustri A/S, Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH and Others, KE KELIT Kunststoffwerk GmbH, LR af 1998 A/S, Brugg Rohrsysteme GmbH, LR af 1998 (Deutschland) GmbH, and ABB Asea Brown Boveri Ltd v Commission* ECLI:EU:C:2005:408, para 211; *Kronofrance* (n 61), para 60

[73] Case C-464/09 P *Holland Malt BV v Commission* EU:C:2010:733, para 46; Case C-667/13 *Estado português v Banco Privado Português SA and Massa Insolvente do Banco Privado Português SA* EU:C:2015:151, para 69

[74] Joined cases T-267/08 and T-279/08 *Région Nord-Pas-de-Calais and Communauté d'agglomération du Douaisis v Commission* ECLI:EU:T:2011:209, para 131; Case T-35/99 *Keller SpA and Keller Meccanica SpA v Commission* ECLI:EU:T:2002:19, para 77

[75] Antonios Bouchagiar, 'The Binding Effects of Guidelines on the Compatibility of State Aid: How Hard is the Commission's Soft Law?' (2017) 8 Journal of European Competition Law & Practice 157, 164

[76] Rusche (n 56), 226

[77] Case C-431/14 P *Greece v Commission* ECLI:EU:C:2016:145, paras 70-72. See also: Bouchagiar (n 75), 160-163

[78] *Dansk Rørindustri* (n 72), para 223

[79] Case C-292/95 *Spain v Commission* ECLI:EU:C:1997:192, paras 33-35

[80] Arhold, Kreuschitz, Säcker, Soltesz, Shuette, Schwab (n 8), para 580

existence of an incentive effect show that those avenues can be limited when it comes to fiscal aid. In this context, it is necessary to briefly examine another condition, namely that compatible aid cannot contravene other provisions of EU law.

III. State aid and other Treaty Provisions

a. General Principles

One of the conditions that all aid measures need to satisfy in order to be compatible with the internal market is that they cannot violate any other provision of EU law.[81] The general rule is that an aid whose provisions contravene other provisions of the Treaty cannot be deemed to be compatible with the internal market.[82] Thus State aid cannot be used to frustrate other Treaty rules.[83] In this context, internal market rules are of particular interest, as they and State aid rules have a common objective, namely ensuring normal conditions of competition.[84] It is established case law that the general principle of non-discrimination enshrined in Article 18 TFEU can only be applied to situations governed by Union law where the Treaty does not provide for a specific prohibition of discrimination.[85] As such, the compatibility of aid measures that by necessity contain discriminatory elements (as by definition they favour *certain* undertakings or activities in a given geographical locale) with the internal market and by extension the Treaty, has to be examined in light of the specific provisions implementing the non-discrimination principle.[86] In essence, the recognition that aid occasionally has the inevitable consequence of somewhat affecting trade cannot be extended to mean that all negative effects can be accepted. It is generally suggested that the Commission prefers to rely on free movement provisions wherever possible when a measure can be seen as being problematic under both free movement law and State aid law.[87]

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[81] *Matra* (n 27), paras 42-43; Case T-359/04 *British Aggregates Association and Others v Commission* ECLI:EU:T:2010:366, paras 91-92

[82] Case C-156/98 *Germany v Commission* (n 5), para 78; *Portugal v Commission* (n 26), para 41; Case C-21/88 *Du Pont de Nemours Italiana SpA v Unità sanitaria locale N° 2 di Carrara* ECLI:EU:C:1990:121, paras 17, 20; *Italy v Commission* (n 28), para 11

[83] Case 18/84 *Commission v France* ECLI:EU:C:1985:175, para 13

[84] Case 91/78 *Hansen GmbH & Co. v Hauptzollamt Flensburg* ECLI:EU:C:1979:65, para 9; *Commission v France* (n 83), para 13

[85] Case C-10/90 *Maria Masgio v Bundesknappschaft* ECLI:EU:C:1991:107, para 12; Case C-179/90 *Merci Convenzionali Porto di Genova v Siderurgica Gabrielli SpA* ECLI:EU:C:1991:464, para 11; Case C-379/92 *Criminal proceedings against Matteo Peralta* ECLI:EU:C:1994:296, para 18. See also: Case 36/74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* ECLI:EU:C:1974:140, paras 6, 16; Case 13/76 *Gaetano Donà v Mario Mantero* ECLI:EU:C:1976:115, paras 6, 17-18

[86] *Peralta* (n 85), para 18; Case T-158/99 *Thermenhotel Stoiser Franz Gesellschaft mbH & Co. KG and Others v Commission* ECLI:EU:T:2004:2, paras 146-147

[87] Andrea Biondi and Martin Farley, 'The Relationship Between State Aid and the Single Market' in E Szyszczak (ed) *Research Handbook on European State Aid Law* (Edward Elgar Publishing 2011), 283; Quigley (n 8), 224

The ECJ has explained that the scope of Article 34 TFEU (and *mutatis mutandis* of Article 35) cannot be conceived as being so wide as to mean that any advantage granted has effects equivalent to quantitative restrictions, as such a reading of Article 34 would negate the telos of the State aid regime, disregarding the allocation of competences set out in the Treaties.[88] Similarly, in the context of discrimination, an aid measure can by definition apply only in the territory for which the enacting authority is responsible, and thus cannot be criticised for not extending the benefit of the measure to undertakings outside its territory, since such undertakings are not in a comparable position as far as State aid is concerned.[89] As such, the mere fact that the benefits of an aid measure are geographically restricted is not *per se* sufficient to make it discriminatory on the basis of nationality. However, partial tax exemptions or differential tax rates can actually be discriminatory in the context of free movement provisions, since they afford better treatment to at least *some* national undertakings, while also being problematic in the context of State aid.[90]

Tax breaks aimed at certain types of investments, can also infringe the free movement of capital.[91] However, free movement of capital is somewhat different from other free movement provisions, as a measure providing for tax breaks differentiating between resident and non-resident investments would make investing in other Member States less attractive if relief is provided only for investments in companies established in the granting State, and would thus violate the rules on the free movement of capital.[92] Logically, if relief for a type of investment is granted in one Member State it must be extended to the same type of investment made by residents of that Member State in other Member States.[93] Such a condition nullifies the value of such tax reliefs as aid measures with specific objectives.[94] This is because even if the aid could meet the compatibility criteria it would either necessarily violate a Treaty provision, rendering the aid incompatible, or it would have to be extended to a degree where it would no longer actually be selective,

[88] *Iannelli & Volpi* (n 17), paras 11-12, 15
[89] *Spain v Commission* (n 58), para 57
[90] See for example: Case C-169/08 *Presidente del Consiglio dei Ministri v Regione Sardegna* ECLI:EU:C:2009:709, paras 7, 34-50, 61-64; Case C-156/98 *Germany v Commission* (n 5), paras 8-9, 84-87; Case C-164/15 P *Commission v Aer Lingus Ltd and Ryanair Designated Activity Company* ECLI:EU:C:2016:990, paras 119-122
[91] Case C-222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA* ECLI:EU:C:2006:8, paras 99-100. See also in this context: Article 65(2) TFEU
[92] Case C-35/98 *Staatssecretaris van Financiën v B.G.M. Verkooijen* ECLI:EU:C:2000:294, paras 35-37; Case C-319/02 *Petri Manninen* ECLI:EU:C:2004:484, para 55; Case C-271/09 *Commission v Poland* ECLI:EU:C:2011:855, para 71; Case C-292/04 *Wienand Meilicke, Heidi Christa Weyde and Marina Stöffler v Finanzamt Bonn-Innenstadt* ECLI:EU:C:2007:132, paras 37-38
[93] Quigley (n 8), 226-227
[94] Consider for example the objectives of the contested measure in *Verkooijen* (n 92), para 34.

and could therefore not benefit *certain* undertakings, sectors, or regions, as per its objectives.

Finally, Articles 30 and 110 TFEU are particularly relevant to this thesis. Those two Articles, despite encompassing prohibitions of different scope,[95] have the same objective of prohibiting discriminatory taxation.[96] However, the Court has recognised that they pursue a more specific objective than Article 107.[97] The relevance of Article 30 and 110 is particularly pronounced in the financing of an aid measure. For example, the financing of an aid scheme granting advantages to domestic products with a levy of general application can be discriminatory,[98] unless the advantages are extended to products coming from other Member States,[99] or imported products are exempted from the charge,[100] as otherwise an effectively discriminatory additional net fiscal burden is imposed.[101] When the levy corresponds to a service actually rendered, non-discriminatorily, the charge will not infringe Article 110.[102] In effect, charges are governed by Article 30 or Article 110 TFEU, while the use to which they are put may constitute State aid, which will be, if, and to the extent that,[103] either of those Articles is violated, incompatible with the internal market.[104]

b. Severability

A severability approach has been developed in relation to the interaction of State aid law and other Treaty provisions. If an aid measure contains aspects that infringe on specific Treaty provisions and which are "indissolubly linked to the

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[95] Case 94/74 *Industria Gomma Articoli Vari IGAV v Ente nazionale per la cellulosa e per la carta ENCC* ECLI:EU:C:1975:81, paras 12-13. See also, in the context of their interaction with State Aid rules: Joined Cases C-78/90, C-79/90, C-80/90, C-81/90, C-82/90 and C-83/90 *Compagnie Commerciale de l'Ouest and others v Receveur Principal des Douanes de La Pallice Port* ECLI:EU:C:1992:118, para 27

[96] Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium SA v Ville de Seraing and Province de Liège* ECLI:EU:C:2006:403, para 55; Case C-221/06 *Stadtgemeinde Frohnleiten and Gemeindebetriebe Frohnleiten GmbH v Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft* ECLI:EU:C:2007:657, para 30

[97] Case C-206/06 *Essent Netwerk Noord BV supported by Nederlands Elektriciteit Administratiekantoor BV v Aluminium Delfzijl BV, and in the indemnification proceedings Aluminium Delfzijl BV v Staat der Nederlanden and in the indemnification proceedings Essent Netwerk Noord BV v Nederlands Elektriciteit Administratiekantoor BV and Saranne* ECLI:EU:C:2008:413, para 60

[98] *Italy v Commission* (n 28), para 15; *Compagnie Commerciale de l'Ouest* (n 95), para 26

[99] *Hansen* (n 84), para 17

[100] Case C-333/07 *Société Régie Networks v Direction de contrôle fiscal Rhône-Alpes Bourgogne* ECLI:EU:C:2008:764, para 115

[101] Case 77/72 *Carmine Capolongo v Azienda Agricole Maya* ECLI:EU:C:1973:65, paras 13-14

[102] Joined Case C-34/01 to C-38/01 *Enirisorse SpA v Ministero delle Finanze* ECLI:EU:C:2003:640, para 62

[103] Case C-174/02 *Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financiën* ECLI:EU:C:2005:10, paras 24-25. See also: Case C-174/02 *Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financiën* Opinion of AG Geelhoed ECLI:EU:C:2004:124, paras 28-29; *Enirisorse* (n 102), para 47

[104] *Compagnie Commerciale de l'Ouest* (n 95), para 32; *Italy v Commission* (n 28), para 9; *Nygård* (n 54), para 55

object of the aid", it is impossible to evaluate the effects of the offending aspects separately, meaning that they are an integral part of the aid measure. In those cases, the entirety of the aid, including the problematic aspects, must be assessed under the State aid framework, as provided by Article 108 TFEU.[105] However, if those aspects of the aid can be separated from the aid measure, in the sense that they are not necessary for the aid to achieve its objective and be successfully administered, then those aspects that infringe on other provisions can be assessed separately, and the aid is not necessarily incompatible.[106] In other words, the severability analysis includes a necessity element.[107] An interesting conflict between (fiscal) State aid and internal market rules can arise in relation to existing aid which turns out to (indissolubly) violate internal market rules, as rectifying the fundamental freedoms infringement can result in the creation of new aid by widening the scope of the existing measure, which is outside the competence of national courts.[108]

The severability approach has been applied in a somewhat confusing manner.[109] Under the severability approach, a measure applicable only to domestic products but not similar imported ones, will be incompatible with the Treaty, conflicting with Article 34 TFEU.[110] In relation to Articles 45, 49, and 56, it is possible for a measure to violate those Articles, as well as the State aid prohibition.[111] An infringement of free movement law cannot in practice be invoked to frustrate State aid proceedings.[112] It is also clear that the introduction of discriminatory taxes can lead to the inadvertent creation of an aid measure.[113] The severability approach can also be applied in relation to the competition provisions of the Treaty, even though

[105] *Iannelli & Volpi* (n 17), para 14
[106] *Ibidem*
[107] *Ibidem,* para 15; Case T-162/06 *Kronoply GmbH & Co. KG v Commission* ECLI:EU:T:2009:2, para 66
[108] Case C-598/17 *A-Fonds v Inspecteur van de Belastingdienst* ECLI:EU:C:2019:352, paras 28, 41, 46-54, 60
[109] Biondi and Farley (n 87), 280. See also: *A-Fonds* (n 108), paras 46-51
[110] *Iannelli & Volpi* (n 17), paras 14-15; Case 249/81 *Commission v Ireland* ECLI:EU:C:1982:402, paras 16-18, 20-30; *Commission v France* (n 83), paras 13, 17; Case 103/84 *Commission v Italy* ECLI:EU:C:1986:229, paras 19, 24; *Du Pont de Nemours* (n 82), paras 20-21; Case C-351/88 *Laboratori Bruneau Srl v Unità sanitaria locale RM/24 di Monterotondo* ECLI:EU:C:1991:304, para 7. See however: Case 249/81 *Commission v Ireland* Opinion of AG Capotorti ECLI:EU:C:1982:293, paras 6-7
[111] *Regione Sardegna* (n 90), paras 7, 34-50, 61-64; Case C-156/98 *Germany v Commission* (n 5), paras 8-9, 84-87. See also: *Ministero dell'Economia* (n 91), paras 150-152; *Calafiori* (n 59), paras 3-9, 48-50, 72; Case C-17/92 *Cinematográficos v Estado Español and Unión de Productores de Cine y Televisión* ECLI:EU:C:1993:172, paras 4, 15-22. See however: Case C-222/07 *Unión de Televisiones Comerciales Asociadas (UTECA) v Administración General del Estado* ECLI:EU:C:2009:124, paras 15, 29-40, 44-46
[112] *Aer Lingus and Ryanair* (n 90), paras 119-122
[113] *Ibidem*

they are addressed at undertakings.[114] In effect, aid cannot be granted without verifying that the recipient is not in a position that violates either Article 101 or 102 TFEU.[115] It is clear from the case law that severability is rarely considered substantively in relation to the fundamental freedoms, or even competition law provisions.[116] Hancher et al. note that since State aid rules can be used as derogations from Treaty Articles, this is in line with a strict interpretation of Treaty derogations.[117]

In relation to Articles 30 and 110 TFEU, the key issue is how the revenue raised from the levy is used,[118] as State aid cannot be considered separately from its method of financing,[119] especially if that method forms an integral part of the measure.[120] Thus, the financing method is an integral and central part of the compatibility analysis.[121] In effect, an aid scheme can be declared incompatible with the internal market solely based on its method of financing,[122] meaning that that method ought to be examined under the prism of both Article 107(1) and Article 110 TFEU.[123] A tax will be treated as an integral part of an aid measure if it is hypothecated to the aid measure, under national rules.[124] A tax cannot be hypothecated to an exemption from the same tax, as a tax exemption's application does not depend on the tax revenue raised by said tax.[125] A tax is hypothecated to an aid when the revenue from that tax is necessarily allocated for financing that aid, as the revenue raised from the tax has a direct impact on the amount of the aid, and

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[114] *Matra* (n 27), paras 41-45. See also: Case T-17/93 *Matra Hachette SA v Commission* ECLI:EU:T:1994:89, para 47; Joined cases T-197/97 and T-198/97 *Weyl Beef Products BV, Exportslachterij Chris Hogeslag BV and Groninger Vleeshandel BV v Commission* ECLI:EU:T:2001:28, para 75

[115] Case C-164/98 P *DIR International Film Srl, and others v Commission* ECLI:EU:C:2000:48, para 29

[116] See for example: *Commission v Ireland* (n 110), paras 16-18; *Commission v Ireland* Opinion of AG Capotorti (n 110), paras 6-7; Case T-49/93 *Société Internationale de Diffusion et d'Edition (SIDE) v Commission* ECLI:EU:T:1995:166, para 72

[117] Hancher, Ottervanger, and Slot (n 65), para 3-114. See also: *van Calster* (n 40), paras 50-54

[118] *Compagnie Commerciale de l'Ouest* (n 95), para 35

[119] Case 47/69 *France v Commission* ECLI:EU:C:1970:60, paras 7-8, 16; *van Calster* (n 40) para 47

[120] *Société Régie Networks* (n 100), paras 89-92; *Pearle* (n 42), para 29; *van Calster* (n 40), para 49 See also: Case C-449/14 P *DTS Distribuidora de Televisión Digital v Commission* ECLI:EU:C:2016:848

[121] Hancher, Ottervanger, and Slot (n 65), para 3-129

[122] Case C-553/03 P *Panhellenic Union of Cotton Ginners and Exporters v Commission* (Order) ECLI:EU:C:2005:170, para 45; Joined Cases C-128/03 and C-129/03 *AEM SpA and AEM Torino SpA v Autorità per l'energia elettrica e per il gas* ECLI:EU:C:2005:224, para 45; C-194/09 P *Alcoa Trasformazioni Srl v Commission* ECLI:EU:C:2011:497, para 48

[123] *France v Commission* (n 119), para 14; *Italy v Commission* (n 28), para 6. See also: *Société Régie Networks* (n 100), paras 115-116

[124] *Streekgewest Westelijk* (n 103), para 26

[125] Joined cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04 *Nazairdis SAS, now Distribution Casino France SAS and Others v Caisse nationale de l'organisation autonome d'assurance vieillesse des travailleurs non salariés des professions industrielles et commerciales (Organic)* ECLI:EU:C:2005:657, para 41; *Air Liquide* (n 96), para 46

its compatibility with the internal market.[126] Additionally, such a financing method makes the amount of aid uncertain, and has the potential to exacerbate the distortive effects of the aid, further complicating a comprehensive compatibility analysis.[127]

Effectively, non-hypothecated charges appear to be equivalent to severable violations of a Treaty provision. In this context, it is submitted that there are "indicators" of hypothecation of a tax to an aid.[128] The logical extension of the hypothecation approach is that non-hypothecated charges, even though they may infringe on either of Articles 30 and 110 TFEU, and even if they, to an extent, finance an aid, will not be illegal under Article 107(1),[129] as they are not integral parts of the aid measure. This is a useful limitation, as in effect all State aid is financed via State resources, which come primarily from taxation. The financing method of the aid thus only becomes truly relevant when a tax itself is problematic under Union law and has a direct link with the aid. Interestingly, a parafiscal aid measure whose funds are earmarked is less likely to satisfy the State resources criterion,[130] but if it does, the earmarking makes it more likely that the financing charge will be seen as hypothecated, making the aid measure less likely to be compatible.

c. Conclusion

This section has discussed the application of the criterion established in *Commission v Italy*, that compatible State aid can never produce a result that is contrary to specific provisions of the Treaties.[131] Conceptually, the objective of State aid is not dissimilar to those of internal market provisions. In this context, a severability approach has been developed by the Courts. It has been shown that the application of this compatibility condition, while not materially different when it comes to fiscal aid, can still be somewhat complicated, especially in relation to partial tax exemptions, or differential taxation. Additionally, conceptual problems can arise due to the wide scope of Article 63 TFEU in relation to the policy-making aspect of taxation, which effectively frustrate the function of certain fiscal incentives. Finally, the relationship between Articles 30 and 110 TFEU and State aid is particularly complex, especially when it comes to the financing of an aid measure via special charges. In brief, it is clear that, in this context, fiscal aid can be somewhat

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[126] *Streekgewest Westelijk* (n 103), paras 26-28; *Air Liquide* (n 96), para 46; *Société Régie Networks* (n 100), paras 111-112; *AEM* (n 122), para 47. See also: Case C-175/02 *F. J. Pape v Minister van Landbouw, Natuurbeheer en Visserij* ECLI:EU:C:2005:11, paras 15-17

[127] *France v Commission* (n 119), paras 19-21

[128] See for example: *Pape* (n 126), paras 15-17. A similar indicators-based approach is employed in relation to the fist limb of the State resources criterion, namely the measure's imputability to the State. See: Part II(a)(i) of the Notions of State Resources, Effect on Trade, and Distortion of Competition Chapter.

[129] *Nazairdis* (n 125), para 53

[130] See for example: *Pearle* (n 42), paras 36-41

[131] *Italy v Commission* (n 28), para 11

different to non-fiscal aid, and potentially subject to more scrutiny during the compatibility analysis. This effectively limits the possibilities to use fiscal aid as a policy tool.

IV. Conclusion

This Chapter has aimed to offer a brief account of the compatibility regime applicable to State aid, focusing on fiscal aids. The Commission enjoys a very wide margin of discretion, a central role in the compatibility process, and extensive powers, being the central player when it comes to compatibility and the assessment of aid in general. Due to the necessarily narrow scope of all derogations, the ever-expanding categories of aid covered by the GBER, and the catalogue of soft law instruments applicable, the derogation regime is becoming increasingly streamlined. The relationship of State aid with other Treaty provisions, especially in relation to fiscal aids, remains somewhat convoluted, and is probably the most legally complex of the common compatibility criteria, as it entails careful consideration of two (or more) different sets of rules, and their own inherent logic.

In the application of this compatibility regime, the existence of common principles, namely those of necessity, proportionality, and observance of other Treaty rules, also informs the limits of what types of aid may be deemed compatible. However, those principles, and specifically the antipathy towards operating aid and the omnipresence of the incentive effect, especially as understood through the prism of the GBER, can create particular problems for the compatibility of fiscal aids. This results from the logic of the notion of incentive effect, as by making necessity a requirement of compatibility, in principle operating aids are *de facto* and *de jure* incompatible with the internal market. Equally, it has been shown that fiscal aid can come into conflict with the fundamental freedoms, and with the discriminatory taxation provisions. Overall, the State aid compatibility regime encompasses several different derogations, but at the same time it arguably is quite limiting for fiscal aids, despite the fact that at first glance there is no difference in the approach to fiscal and non-fiscal measures.

In effect therefore, it is clear that there are significant hurdles to the compatibility of fiscal aids, which mean that the chances for such aids being deemed compatible with the internal market are limited. This conclusion needs to be analysed in conjunction with the wide definition of the concept of fiscal State aid under Article 107(1) TFEU. As the remaining Chapters of Part I demonstrate, the notion and the scope of fiscal aid have been significantly widened, as a result of the consistent widening of the selectivity criterion which sits at the centre of the notion of fiscal aid. The combination of a wide concept of aid, which in effect means that more fiscal measures can be classified as aid, and a limited compatibility regime can arguably significantly limit a Member State's powers to pursue varied policy objectives through its fiscal regime. Thus, even though the compatibility regime for

fiscal aids is not conceptually materially different or more stringent than the one applicable to non-fiscal aids, it can still be particularly limiting especially in the context of the increasing width of the notion of fiscal aid itself. This conclusion therefore informs the analysis in Part I of this thesis, as practically, on the one hand the ever-widening scope of material selectivity and the notion of aid can render a host of national tax rules State aids, while on the other the possibilities for such aids to be compatible are severely limited. In short, both issues can be potentially problematic in and of themselves, but their combined effects create clear issues, both in terms of the scope of the (conditional and non-absolute)[132] prohibition of (fiscal) aids, and in relation to the exercise of exclusive taxing powers by Member States.

[132] *Steinke und Weinlig* (n 2), para 8; *La Poste* (n 2), para 36

The Notion of Fiscal Selectivity

I. Introduction

The existence of aid, under the State aid prohibition expressed in Article 107(1) TFEU, hinges on five cumulative requirements. In general, before mentioning the criteria, it is important to note that, as State aid forms part of the Commission's competition apparatus, the aid must be granted to undertakings, as defined for the purposes of competition law in general. First of all, a measure must favour its recipient, by conferring an advantage. Secondly, the intervention of the State must distort, or threaten to distort, competition, and thirdly, must affect trade between Member States. Fourthly, the aid must be granted by the State or through State resources, and finally, the State measure granting the aid must favour certain undertakings or the production of certain goods, or in other words be selective. This Chapter will look at the notion of selectivity as it applies to fiscal cases, while the remaining four criteria are discussed in the following Chapters.

In the wording of Article 107(1) selectivity is expressed by the phrase "favouring certain undertakings or the production of certain goods". This means that the selectivity condition in essence relates to a limitation of the advantage granted. A measure which could be construed as a general advantage, for example a reduction of the corporate tax rate, is not limited in any way that favours certain undertakings or the production of certain goods; it favours all undertakings and the production of all goods. Thus, it is a general measure. The recipient of the aid needs to be compared with other undertakings, in a similar legal and factual situation. This can be understood, and indeed has been,[1] as an expression of the general EU law principle of equal treatment. As pointed out by Cisotta, the preferential treatment afforded to only some of the market operators, intuitively appears to "undermine the existence of a level playing field".[2] As AG Maduro explains, selectivity offers the best rationale for the application of State aid, as it deals with the crux of the concept of aid, preferential treatment.[3] In principle, as he states, only distortions resulting from preferential treatment are the proper subject of the State aid prohibition.[4] Selectivity sits therefore at the heart of the State aid prohibition. Lang observes that in fiscal cases selectivity is extremely important, as it is inevitably linked with the analysis of the advantage, and on occasion, of State resources.[5] Therefore, the relevance of the selectivity analysis in fiscal cases cannot be understated, as its

[1] Case C-353/95 P *Tierce Ladbroke v Commission* Opinion of AG Cosmas ECLI:EU:C:1997:233, para 30

[2] Roberto Cisotta, 'Criterion of Selectivity' in H Hofmann and C Micheau (eds) *State Aid Law of the European Union* (OUP 2016), 129

[3] Case C-237/04 *Enirisorse SpA v Sotacarbo SpA* Opinion of AG Maduro ECLI:EU:C:2006:21, para 49

[4] *Ibidem*

[5] Michael Lang, 'State Aid and Taxation: Selectivity and Comparability Analysis' in I Richelle, W Schön, E Traversa (eds) *State Aid Law and Business Taxation* (Springer 2016), 29

application can interfere with two of the remaining four criteria (and arguably the only two remaining relevant ones).[6] This Chapter, recognising the paramount importance of selectivity in fiscal cases, will analyse the limbs of the test employed by the Commission and the CJEU to determine the selectivity of a given fiscal measure. The examination of the case law reveals a number of significant problems with the notion of fiscal selectivity. Through this analysis, this Chapter will show that the notion of fiscal selectivity has been significantly widened. Given the importance of the notion of selectivity described above, such a widening is in itself problematic, and, as will be shown in the remaining Chapters of Part I, in effect means that the notion of fiscal aid itself has been widened.

Throughout the analysis of selectivity, and aid in general, it is essential to remember that both concepts focus on the effects of the contested measure or scheme. This is evident from the very early case law,[7] and expanded upon since. For example, in *Italy v Commission* the ECJ held that Article 107 is preoccupied with effects over form or policy aims.[8] Thus, the fiscal form or policy aim of a given measure is irrelevant when it comes to the application of Article 107, or that measure's aid character.[9] This principle has found consistent expression in the case law of the ECJ,[10] and as will be shown plays a significant role in the analysis of all criteria.

Additionally, it is worth noting from the outset that the scope of selectivity is not generally concerned with secondary selective effects.[11] In *Viscido*, AG Jacobs argued against the extension of the State aid prohibition to such effects stemming from the effects of a general measure, as it would entail an investigation of a Member State's entire economic and social system.[12] The Commission, in its 2016 Notice, clarifies that secondary effects will only be within the scope of selectivity if it

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[6] "It is clear from the Court' s case law that the requirement of an effect on trade between Member States is easily satisfied". See to that effect: Joined cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* Opinion of AG Jacobs ECLI:EU:C:1994:112, para 33. This is also discussed in Part III of the Notions of State Resources, Effect on Trade, and Distortion of Competition Chapter.

[7] Case 30/59 *De gezamenlijke Steenkolenmijnen in Limburg v High Authority* ECLI:EU:C:1961:2, 19

[8] Case 173/73 *Italy v Commission* ECLI:EU:C:1974:71, para 13

[9] *Ibidem*

[10] Case C-241/94 *France v Commission* ECLI:EU:C:1996:353, para 20; Case C-75/97 *Belgium v Commission* ECLI:EU:C:1999:311, para 25; Case C-409/00 *Spain v Commission* ECLI:EU:C:2003:92 para 46; Case C-172/03 *Heiser v Finanzamt Innsbruck* ECLI:EU:C:2005:130, para 46; Case C-487/06 P *British Aggregates Association v Commission* ECLI:EU:C:2008:757, para 85; Case C-522/13 *Ministerio de Defensa and Navantia SA v Concello de Ferrol* ECLI:EU:C:2014:2262, para 28; Case C-124/10 P *Commission v EDF* ECLI:EU:C:2012:318, para 77; Joined Cases C-399/10 P and C-401/10 P *Bouygues and Bouygues Télécom v Commission and Others* and *Commission v France and Others* EU:C:2013:175, para 102

[11] Commission Notice on the notion of State Aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [2016] OJ C 262/1 paras 115-116

[12] Joined cases C-52/97, C-53/97 and C-54/97 *Epifanio Viscido, Mauro Scandella and Others and Massimiliano Terragnolo and Others v Ente Poste Italiane* Opinion of AG Jacobs ECLI:EU:C:1998:78, para 16

is possible *ex ante* to determine the secondary beneficiaries, as an identifiable undertaking or group of undertakings.[13] This position follows from the fact that general measures are in principle outside the scope of selectivity.

The 1998 Commission Notice on the application of the State aid rules to measures relating to direct business taxation (the 1998 Notice), as well as the 2016 Commission Notice on the notion of State aid (the 2016 Notice), set out very similar tests for determining whether a particular measure is selective.[14] In simple terms, selectivity, in fiscal cases, occurs when certain undertakings are treated, for tax purposes, differently from the "norm", meaning that there must exist a derogation from the (general) system, to the undertakings' favour. As a result, traditionally, and in both the 1998 and 2016 Notices, selectivity in State aid has been examined through a three-step analysis. The three-step approach as it applies to fiscal cases can be briefly expressed as follows: (a) identification of the general tax system which constitutes the relevant reference benchmark, (b) assessment of whether the tax measure departs from the reference tax system, and (c) an examination of whether the tax measure can be justified by reference to the logic of the tax system.[15] It is worth noting that the CJEU has iterated several formulations of the test: the case law on the matter, though extensive has been nebulous, at best. Micheau however explains that only one test exists, although it has been described in different ways.[16] Any test would include the necessity to identify a general scheme, and whether there is a difference in treatment by analysing undertakings in a comparable legal and factual situation (within the aforementioned general scheme), before examining potential justifications for any derogation. *Paint Graphos* was a seminal case, where the most up-to-date formulation of the three-step test was reaffirmed.[17] Prior to that case, usually the analysis of selectivity and the application of the test was formalistic and resulted in the national tax system being the reference system, meaning that every variation on it would be a derogation for the purposes of

[13] 2016 Notice (n 11), para 116

[14] Commission Notice on the application of the State Aid rules to measures relating to direct business taxation [1998] OJ C 384/3, para 16; 2016 Notice (n 11), para 128

[15] Case C-143/99 *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten* ECLI:EU:C:2001:598, para 41

[16] Claire Micheau, 'Tax Selectivity in European Law of State Aid: Legal Assessment and Alternative Approaches' (2015) 40 European Law Review 323, 328

[17] Joined Cases C-78/08, C-79/80, and C-80/08 *Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v Paint Graphos Soc. coop. arl Adige Carni Soc. coop. arl, in liquidation v Agenzia delle Entrate and Ministero dell'Economia e delle Finanze and Ministero delle Finanze v Michele Franchetto* ECLI:EU:C:2011:550. See also: Joined Cases C-78/08, C-79/80, and C-80/08 *Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v Paint Graphos Soc. coop. arl Adige Carni Soc. coop. arl, in liquidation v Agenzia delle Entrate and Ministero dell'Economia e delle Finanze and Ministero delle Finanze v Michele Franchetto* Opinion of AG Jääskinen ECLI:EU:C:2011:411

selectivity.[18] As a result, the *Paint Graphos* formulation of the three step test, and its evolution over the last decade, will be the main formulation used in this Chapter.

The increasingly complex regulatory techniques employed by the Member States to confer selective advantages through their tax systems complicates matters even more,[19] creating situations where even the entirety of the corporate tax system can be seen as selective.[20] Consequently, it is no surprise that each of the three steps, and especially the first two, can give rise to serious issues. Those issues will be discussed in this Chapter, in which each limb of the test described above will be examined individually in a dedicated section, allowing for a systematic analysis of selectivity as it applies to fiscal cases.

II. Step One

a. General Position

As mentioned above, the analysis of fiscal selectivity is based on a three-step test. The first step of this test requires the identification of a reference framework, based on which the contested measure will be judged. Before the comparability element of selectivity can begin in earnest therefore, first of all, the reference framework must be ascertained. This section of the Chapter will examine what is meant by a reference framework and will showcase how this framework has been defined in the case law. Additionally, it will look at the importance of identifying the correct reference framework, and of its width.

The reference framework is, in broad terms, a general scheme from which the derogation occurs, and against which the derogation is measured. This initial step of the analysis bears great significance, as the general framework can be defined narrowly or widely. A wide system of reference means that finding a derogation from it becomes significantly easier. It is reasonable that the Commission, who is in charge of conducting the investigations, and bears the burden of proof for the first two steps of the analysis, has an interest in defining the system of reference widely. This step is particularly important because it informs the rest of analysis,[21] and it has been called "the heart of the selectivity test".[22]

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[18] Jose Luis Buendia Sierra, 'Finding Selectivity or the Art of Comparison' (2018) 17 European State Aid Law Quarterly 85, 87. See also: Flavia Tomat, 'The Preliminary Ruling of the Court of Justice on Preferential Taxation of Cooperatives and State Aid Rules' (2012) 11 European State Aid Law Quarterly 462

[19] Wolfgang Schön, 'Tax Legislation and the Notion of Fiscal Aid: A Review of 5 Years of European Jurisprudence' in I Richelle, W Schön, E Traversa (eds) *State Aid Law and Business Taxation* (Springer 2016), 23

[20] See for example: Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732. This "*de facto*" selectivity will be discussed further in this Chapter.

[21] Case C-88/03 *Portugual v Commission* ECLI:EU:C:2006:511, para 56. See also: Case C-88/03 *Portugual v Commission* Opinion of AG Geelhoed ECLI:EU:C:2005:618.

[22] Case C-270/15 P *Belgium v Commission* Opinion of AG Bobek ECLI:EU:C:2016:289 para 29

The 2016 Notice defines the reference framework as being "composed of a consistent set of rules that generally apply – on the basis of objective criteria – to all undertakings falling within its scope as defined by its objective".[23] When it comes to tax, the tax base, the taxable persons, the taxable event and the tax rates can all be used to define the reference framework.[24] However, this is not as straightforward as it appears. In a number of judgments, the CJEU has found the reference framework to be as wide as the general, ordinary system of taxation. The reference framework has for example been found to be the general regime for the taxation of business profits,[25] the general property tax system, as established by the relevant national legislation,[26] the tax rate in force in the geographical area in question,[27] the rules on "the tax treatment of financial goodwill", as a part of the general national corporate tax regime,[28] or the fiscal regime applicable to all undertakings.[29] In *British Aggregates*, where the measure in question was a special levy, the levy itself was the relevant reference framework.[30] In *France Telecom v Commission* the reference system was held to be the various rates applicable in the different local authorities across France, as opposed to the weighted average tax to which France Telecom was subject.[31] Overall, it is clear that a degree of flexibility exists in the definition of a reference framework, which also means that that definition is not always straightforward. In fact, as will be discussed below, it is even possible for two reference frameworks to be applicable to the same case. This is the inevitable result of the inherent complexity of corporate taxation regimes, and the aforementioned regulatory techniques.

b. The Form and Width of the Reference Framework

In *Paint Graphos*, the general regime of corporation tax was held to be the relevant reference framework.[32] This however was not done automatically. Rather, the ECJ argued that since co-operative societies had the same basis of assessment for the purposes of corporation tax as for-profit companies, the two categories had

[23] 2016 Notice (n 11), para 133
[24] *Ibidem*, para 134
[25] Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v Commission* ECLI:EU:C:2006:416, para 95
[26] *Concello de Ferrol* (n 10), para 36
[27] *Portugal v Commission* (n 21), para 56
[28] Case T-399/11 *Banco Santander SA v Commission* ECLI:EU:T:2014:938, para 54; Case T-219/10 *Autogrill España SA v Commission* ECLI:EU:T:2014:939, para 50; Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free Group (formerly Autogrill España), Banco Santander & Santusa Holding* ECLI:EU:C:2016:981, para 63
[29] *Adria-Wien* (n 15), paras 49-51
[30] Case T-210/02 RENV *British Aggregates Association v Commission* ECLI:EU:T:2012:110, paras 49-51
[31] Case C-81/10 P *France Telecom v Commission* ECLI:EU:C:2011:811, para 18
[32] *Paint Graphos* (n 17), paras 49-50

to be within the same reference framework. This was reinforced by the objective of the reference framework, namely the taxation of corporate profits.[33] It is worth noting that the objective of the measure will also be used in the analysis, not to define the reference framework, but rather to inform the limits of the comparison inherent in the second step.[34] However, the reference framework does not have to be a general regime. In *Sigma Alimentos* the General Court stated that it was possible for a measure to be its own reference framework, if it is clearly delimited, and it pursues specific objectives, thusly being distinguishable from all other fiscal rules applicable in the relevant territory.[35] In such cases, the Court went on to say, the selectivity of a measure is to be assessed based on whether that measure excludes from its scope undertakings that in light of the objectives of the system are comparable (legally and factually) to those to which it applies.[36] If such a reference framework, defined in line with the applicable legal regime, is not in itself discriminatory and is applied in a non-discriminatory way, selectivity cannot exist, as was the case in *Hansestadt Lübeck*.[37] This case shows how important the width of the reference framework can be, and how interlinked it is with the legal regime applicable to the measure in question.

An interesting example of how the reference framework can be defined can be found in *Aer Lingus*. The contested measure was a differential rate of Air Travel Tax (ATT) chargeable on different flights, based on the distance travelled. The reference system was defined as "the taxation of air passengers departing on an aircraft" from an Irish airport.[38] Given that only a small percentage of all flights were subject to the lower rate of ATT, the Commission argued that the higher rate had to be seen as the rate applicable to the reference framework, while the lower rate formed an exemption from this reference framework.[39] On a joint appeal, the ECJ upheld this determination of the reference framework,[40] despite the fact that both rates were introduced simultaneously and by the same legislation. Additionally, the ECJ held that a third, uniform rate introduced at a later date could not be the reference framework, as it was not applicable at the time.[41] As the lower rates were essentially applicable primarily to domestic flights, there was a possibility that the

[33] *Ibidem*, para 54
[34] Case C-279/08 P *Commission v The Netherlands (NOx)* ECLI:EU:C:2011:551, para 87
[35] Case T-239/11 *Sigma Alimentos Exterior v Commission* ECLI:EU:T:2018:781, para 113
[36] *Ibidem*
[37] See for example: Case C-524/14 P *Commission v Hansestadt Lübeck* ECLI:EU:C:2016:971, paras 61-64
[38] Case T-473/12 *Aer Lingus v Commission* ECLI:EU:T:2015:78, para 54; Case T-500/12 *Ryanair v Commission* ECLI:EU:T:2015:73, para 79
[39] *Ibidem*, para 55; para 80, respectively
[40] Case C-164/15 P *Commission v Aer Lingus Ltd and Ryanair Designated Activity Company* ECLI:EU:C:2016:990, paras 52, 58
[41] *Ibidem*, paras 49, 52

higher rate would be struck down as a violation of free movement provisions,[42] but the ECJ held that this was not relevant in the assessment of State aid, and therefore the reference framework.[43] This judgment confirms on the one hand that the reference framework has to be determined based on its actual effects, and that hypothetical elements and future developments cannot inform it.

In light of the above, a case worth analysing in detail is the *Gibraltar* case,[44] and its appeal.[45] *Gibraltar* was (and still is) one of the more controversial State aid cases, drawing praise and criticism, being dubbed a "methodological revolution",[46] and credited with "heralding a new age in State aid control of tax measures for the completion of the Union's internal Market".[47] What made the case unique, and by extension controversial, was the fact that the ECJ was asked to evaluate the selectivity of the entirety of a tax system as opposed to that of a specific tax measure.[48]

Due to the peculiar facts of this case, some discussion of its context is necessary before analysing the judgments. In 2002, the government of Gibraltar decided to reform the entirety of its corporate tax system. It replaced the standard corporate regime it had employed until then with a new regime, based upon three distinct charges, namely a payroll tax, a business property occupation tax, and a registration fee.[49] The liability of any given company under those two taxes was to be capped at 15% of their annual profits, meaning that both taxes, beyond being capped, only applied to companies that were realising profits,[50] despite the tax base not being profit induced. The registration fee also varied.[51] The system also provided for an additional top-up tax for financial services companies, but the overall liability remained capped at 15%.[52] At first glance, a lot of elements of Gibraltar's tax reform seem potentially problematic.[53] Unprofitable companies did

[42] *Ibidem*, paras 69, 75
[43] *Ibidem*, para 77
[44] Joined Cases T-211/04 and T-215/04 *Government of Gibraltar and United Kingdom v Commission* ECLI:EU:T:2008:595
[45] *Gibraltar* (n 20)
[46] Michael Lang, 'The Gibraltar State Aid and Taxation Judgment A "Methodological Revolution"?' (2012) 11 European State Aid Law Quarterly 805, 807
[47] Pierpaolo Rossi-Maccanico, 'Gibraltar: Beyond the Pillars of Hercules of Selectivity' (2012) 11 European State Aid Law Quarterly 443
[48] Cristina Romariz, 'Revisiting Material Selectivity in EU State Aid Law Or "The Ghost of Yet-To-Come' (2014) 13 European State Aid Law Quarterly 39, 44
[49] Commission Decision 2005/261/EC of 30 March 2004 on the aid scheme which the United Kingdom is planning to implement as regards the Government of Gibraltar Corporation Tax Reform [2005] OJ L 85/1
[50] *Ibidem*, recital 14
[51] *Ibidem*, recital 15
[52] *Ibidem*, recital 19
[53] *Ibidem*, recital 31

not incur any tax liability in relation to payroll and property occupation,[54] while companies with large profits also benefited by having their tax liability capped.[55] However, the main contentious issue of the reform was that, in effect, offshore companies were exempted from taxation, since they would not have any employees, and would not occupy any business premises.[56] As a result, and in light of the scale of the offshore sector in Gibraltar, the Commission held that the new corporate taxation system put in place was not of a general character, and therefore was selective.[57] It is safe to agree with Luja, who argues that Gibraltar's proposed reform was "far from a textbook model of either a corporate income tax, a payroll tax or a property tax",[58] and almost invited the Commission's scrutiny. The stage was set for a landmark judgment, regardless of who would eventually win.

The General Court overturned the Commission's Decision, arguing that the Commission had failed to identify a proper reference framework to benchmark any derogation from, since the general framework was the one under review.[59] It went on to state that a differentiation in treatment between undertakings is "not selective when it arises from the nature or general scheme of the system of charges of which it forms part".[60] On appeal, AG Jääskinen in his Opinion stated that the increasing complexity of tax measures made it incrementally more difficult to differentiate between general measures and selective ones.[61] He agreed with the General Court, arguing that the logical conclusion of the Commission's reasoning would be a "comparison between the tax regime as it exists and another – hypothetical and non-existent – system".[62] The main crux of the argument as it emerges through his Opinion is that the lack of a properly determined "normal" regime cripples the selectivity analysis, and that the ECJ should not resort to "ad hoc" solutions.[63]

However, the ECJ decided to set aside the EGC's judgment and disregard the AG's Opinion. The effects-based approach[64] was expanded to say that a measure is independent of the (regulatory) techniques used. The ECJ expanded on this issue, arguing that the General Court had erred by assessing the form rather than the effect of the measure,[65] and that if such an approach was to become the

[54] *Ibidem*, recital 128
[55] *Ibidem*, recitals 134-135
[56] *Ibidem*, recitals 140-142
[57] *Ibidem*, recitals 143-144
[58] Raymond Luja, '(Re)shaping Fiscal State Aid: Selected Recent Cases and Their Impact' (2012) 40 INTERTAX 120, 129
[59] *Gibraltar* (n 44), para 170
[60] *Ibidem*, para 144
[61] Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* Opinion of AG Jääskinen ECLI:EU:C:2011:215, para 178
[62] *Ibidem*, para 202
[63] *Ibidem*, para 134
[64] *British Aggregates* (n 10), para 85
[65] *Gibraltar* (n 20), para 88

norm, it would make national tax rules immune to State aid by placing them outside of its scope.[66] The ECJ confirmed that the reference framework was indeed the entirety of the tax regime,[67] arguing that the *system* itself favoured offshore undertakings. Additionally, the ECJ argued that the absence of another basis of assessment that would catch offshore companies meant that the effects of the corporate tax system as a whole were discriminatory, even though those (existing) bases were based on objective criteria.[68] The Court explained that the bases of assessment used in the general tax regime allowed certain undertakings to be *ex ante* identified and characterised as a "privileged category", thus giving rise to selectivity.[69]

In essence, the beneficiaries of the seemingly "general" reform were *ab initio* identifiable based on their inherent characteristics. Commentators argued that the judgment demonstrates that the selectivity assessment of tax measures is "substantive rather than formal",[70] and that the ECJ was right to look at what the objective of a "normal" system of corporate taxation should and was purported to be (the taxation of all companies established in Gibraltar).[71] What this judgment essentially says is that the effects of the measure are more important than finding a benchmark against which those effects can be examined. The rationale of *Gibraltar* therefore reinforces the effects-based approach, and as a result of this demonstrates the possibility for selective tax systems to exist.

It can be argued that *Gibraltar* is a unique judgment, responding to a unique situation, but the logic employed is far from clear, and not consistent with the way in which the selectivity assessment of fiscal measures was supposed to work, as expressed through the three-step test.[72] If we wish to follow the logic of this test, in essence the ECJ was presented with an arguably *ab initio* discriminatory general system, and decided to increase the level of generality of the reference framework to a hypothetical corporate tax system (which, in all fairness would mirror what is the norm across the world, having as its objective the taxation of corporate profits, in line with the revenue-generating role of taxation),[73] in order to be able to declare the actual general system as the problematic measure. The legacy of the *Gibraltar* case, rather than the novel approach or the methodological revolution, in the author's opinion is a further blurring of the lines between general measures (that

[66] *Ibidem*, para 92
[67] *Ibidem*, para 95
[68] *Ibidem*, paras 101-102
[69] *Ibidem*, para 104. See also: Conor Quigley, 'Direct Taxation and State Aid: Recent Developments Concerning the Notion of Selectivity' (2012) 40 INTERTAX 112, 118
[70] Pierpaolo Rossi-Maccanico, 'The Gibraltar Judgment and the Point on Selectivity in Fiscal Aids' (2009) 18 EC Tax Review 67
[71] Lang, 'A "Methodological Revolution"?' (n 46), 811
[72] *Paint Graphos* (n 17), para 49
[73] See in general: Luja, '(Re)shaping Fiscal State Aid' (n 58), 129-131

ought, by virtue of their generality, escape State aid control as they cannot by definition by selective), and *de jure* or *de facto* selective ones. However, despite any vagueness or uncertainty the judgment may have created, it showcases that *ab initio*, *de facto* selective systems can be caught by Article 107(1), lending the selectivity analysis a great deal of functionality. What *Gibraltar* essentially tells us is that a measure will not only be selective if it takes the form of an exemption, but also when it provides for an obligation that has too narrow a scope. The judgment is however silent on what constitutes too narrow a scope. Despite the Court taking issue with regulatory technique, this case does not necessarily stop it. As Luja observes, if Gibraltar had argued that it was merely introducing a payroll and a business occupancy tax instead of a general system of corporate taxation, given that there is no obligation for a Member State to have such a system in place, it could have escaped the scrutiny of State aid rules.[74]

In the context of the *Gibraltar* approach, it is necessary to discuss, albeit briefly, the *ANGED* preliminary references.[75] All five cases deal with three regional taxes, one in Catalunya, one in Asturias, and one in Aragón.[76] The three aforementioned regions introduced taxes on large retailers (each regional law containing a different definition of "large retailer") in order to offset the negative effects such retailers can have on the environment and the local economy. All three taxes were to be levied based on the square footage of the retailers, and all three taxes included exemptions for certain kinds of retailers. The judgments, all resulting from preliminary references from the Tribunal Supremo, are very similar, as are the Opinions of AG Kokott.[77] As a result, they will be considered together.

[74] Raymond Luja, 'The selectivity test: The Concept of Sectoral Aid' in A Rust and C Micheau (eds) *State Aid and tax law* (Wolters Kluwer 2013), 112

[75] Case C-233/16 *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Generalitat de Catalunya* ECLI:EU:C:2018:280; Joined Cases C-234/16 and C-235/*16 Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Consejería de Economía y Hacienda del Principado de Asturias and Consejo de Gobierno del Principado de Asturias* ECLI:EU:C:2018:281; Joined Cases C-236/16 and C-237/16 *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Diputación General de Aragón* ECLI:EU:C:2018:291

[76] It is worth mentioning that Spain's tax system is highly devolved, with more than 40% of taxes ceded to or received by regional and local governments. See: Pablo Hernández de Cos and David López Rodríguez, *Tax Structure and Revenue-Raising Capacity in Spain: A Comparative Analysis with the EU* (Documentos Ocasionales. N.º 1406, Banco de España 2014)

[77] Case C-233/16 *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Generalitat de Catalunya* Opinion of AG Kokott ECLI:EU:C:2017:852; Joined Cases C-234/16 and C-235/16 *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Consejería de Economía y Hacienda del Principado de Asturias and Consejo de Gobierno del Principado de Asturias* Opinion of AG Kokott ECLI:EU:C:2017:853; Joined Cases C-236/16 and C-237/16 *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Diputación General de Aragón* Opinion of AG Kokott ECLI:EU:C:2017:854

In all three judgments, the ECJ reiterated that a reference framework can be regional, if the entity introducing it enjoys sufficient autonomy.[78] This means that selectivity ought to be determined within the limits of the jurisdiction that adopts the contested measure. Equally, it showcases that the constituent elements of the selectivity analysis must also reflect the system in which selectivity is to be assessed. What makes those judgments relevant to the discussion of the reference framework is that the ECJ appears to endorse a more functional approach for the determination of the reference framework. Having stated that the point of the exercise of selectivity is substantive, the ECJ confirmed that the effects of the measures need to be examined, rather than their form, and that regulatory technique could not exclude from the outset potentially comparable undertakings, even in the lack or the apparent lack of a derogation from a reference framework.[79] The effects of the contested measures were such, to the extent that they excluded from the application of the relevant taxes undertakings using smaller retail areas. In that regard, the contested measures were indistinguishable from the reference framework, which was found to be "a regional tax on retail establishments whose sales areas exceed a certain threshold".[80]

What emerges from this judgment is that selectivity can exist at multiple levels. When it comes to the size-specific thresholds, the whole system can be selective, by excluding smaller retail areas *ab initio*, necessitating a *Gibraltar*-style approach, and an analysis of its effects. The formal exemptions on the other hand clearly depart from the reference framework. In other words, a measure can on the one hand be its own reference framework, while also containing a derogation from itself. An interesting point arises from the Opinions of AG Kokott in the cases, where she stated that "the determination of a 'normal' tax system cannot be decisive".[81] What this means exactly is unclear, as the discussion of the reference system, both by AG Kokott and the ECJ, was brief. However, given that she referred to the *Gibraltar* case in conjunction with the above statement, and advocated that the decisive factor ought to be the effects of the measure,[82] it is reasonable to conclude that the above statement is a rejection of the overtly formalistic approach towards the determination of a reference system, and an endorsement of a more functional and substantive one.

In summary, the case law shows that a measure may be its own reference system. It is easy to see the parallels between *Gibraltar* and *ANGED*, as in both cases

[78] *ANGED v Catalunya* (n 75), para 41; *ANGED v Asturias* (n 75), para 34; *ANGED v Aragón* (n 75), para 29
[79] *Ibidem*, paras 44-49, paras 37-42, paras 32-37 respectively.
[80] *Ibidem*, para 46, para 39, and para 34 respectively.
[81] *ANGED v Catalunya* Opinion of AG Kokott (n 77), para 88; *ANGED v Asturias* Opinion of AG Kokott (n 77), para 86; *ANGED v Aragón* Opinion of AG Kokott (n 77), para 88
[82] *Ibidem*

the reference framework (despite the vast difference of the level of generality between the two) excluded certain types of undertakings from tax liability, without a formal derogation being necessary. Not needing a derogation can be particularly useful in functional terms, as it allows a measure to be examined in light of its effects, without getting bogged down in the search of a higher level of generality which may not actually exist. It essentially is a clever way to get around the structure of the three-step test. As such, the generality or width of a reference framework can wildly vary, from a specialised levy to the entirety of a territory's corporate tax regime and everything in between. It is clear that the focus of the analysis should be placed on the effects, but at the same time the reference framework has an intra-systemic limitation, being dependant on the jurisdiction and tax regime in which it exists.

c. The *Sanierungsklausel* Cases and the Holistic Approach

As mentioned above, it is not always easy to identify the correct reference framework for a given case, as there may be more than one possible option. As it has been shown in the previous part, the width of the reference framework can range from being very narrow to the widest one imaginable. Nonetheless, ensuring its correct identification is of paramount importance. In this context, the series of cases stemming from Commission Decision 2011/527,[83] which examined a German loss carry-forward provision (the *Sanierungsklausel*), are of particular interest.

Under German law, corporate taxation is based on the Einkommensteuergesetz (Income tax Act - EStG) and the Körperschaftsteuergesetz (Corporate Income Tax Act - KStG), both of which have provisions allowing losses to be carried forward,[84] which is a common feature of several national EU tax systems.[85] However, those provisions resulted in Mantelgesellschaften, the trade in dead companies that still had losses to carry forward, leading to the amendment of the KStG in 1997 to stop this practice. The 1997 rule was further restricted in a 2008 amendment, but a further amendment in 2009 relaxed the rules on the availability of the loss carry-forward to undertakings in difficulty if they were acquired for the purposes of restructuring, subject to a list of objective criteria.[86] Under the new regime, according to the Commission, the general rule was the forfeiture of loss carry-forwards upon a change in ownership, meaning that the 2009 amendment was an exception to said rule.[87] The Commission, starting from rule **(a)**, the taxation

[83] Commission Decision 2011/527/EU of 26 January 2011 on State Aid C 7/10 (ex CP 250/09 and NN 5/10) implemented by Germany – Scheme for the carryforward of tax losses in the case of restructuring of companies in difficulty (Sanierungsklausel) [2011] OJ L235/26
[84] *Ibidem*, recital 5
[85] Edoardo Traversa, 'State Aid and Taxation: Can an Anti-avoidance Provision be Selective?' (2014) 13 European State Aid Law Quarterly 518, 521
[86] Sanierungsklausel Decision (n 83), recital 5. In general, for the evolution of the contested provision, see recitals 7-20
[87] *Ibidem*, recital 22

of profits under the KStG and the EStG which is the most general system, moved into rule **(b)**, the exemption from taxation of profits which are set against losses carried forward (§10d(2) EStG and §8(1) KStG) to rule **(c)**, the non-application of (b) in certain cases to prevent abuse, in other words the forfeiture of losses, (§8c(1) KStG), to rule **(d)** an exception to rule (c) and the application of rule (b) in the case of undertakings in difficulty, subject to the conditions of rule (d) (§8c(1a) KStG). This structure goes from a general principle of taxation to a very specific rule (the exception of an exception of an exemption). This factual breakdown demonstrates the importance of selecting the correct reference system, in order to be able to assess whether a measure is actually selective.

In its Decision, the Commission determined rule (c) above, to be the reference framework.[88] The Commission noted that it has used the same rule as a reference framework in a previous Decision,[89] stating that the rationale of that Decision applies in the current one, thusly limiting its analysis of the reference framework to two paragraphs. However, the *MoRaKG* Decision to which the Commission refers is threadbare when it comes to the analysis of selectivity, or most of the other criteria of State aid for that matter. The analysis is carried out simply to the extent where the Commission "notes that the measure is undisputedly selective", without going into much more detail.[90]

The Decision was appealed by some undertakings affected by it. The position of the applicants was that rule (b) above is the general system, while rule (c) is an exemption to it, and rule (d) an exemption to the exemption which "merely re-establishes the general rule".[91] However, the General Court agreed with the Commission's determination of the reference system as the forfeiture of losses when a change of ownership occurred.[92] Following a rather formalistic approach,[93] the logic of the Commission and the General Court appears sound. After all, it is a general rule of the German corporate tax regime that carrying-forward losses is limited to companies that have not changed ownership. At the same time however, it is an equally, if not more, general rule that companies are allowed to carry-forward losses (rule (b) above). The judgments were appealed.

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[88] *Ibidem*, recitals 25, 66-67

[89] Commission Decision 2010/13/EC of 30 September 2009 on aid scheme No C2/09 (ex N 221/08 and N 413/08) which Germany intends to grant to modernise the general conditions for capital investments [2010] OJ L 6/32

[90] *Ibidem*, recital 78

[91] Case T-287/11 *Heitkamp BauHolding v Commission* ECLI:EU:T:2016:60, para 99

[92] *Ibidem*, paras 107-109; Case T-620/11 *GFKL Financial Service AG v Commission* ECLI:EU:T:2016:59, para 91

[93] However, as demonstrated in the *Gibraltar* case above (n 20), such a formalistic approach should not necessarily be employed. AG Wahl in his Opinion in Case C-203/16 P *Dirk Andres (faillite Heitkamp BauHolding) v Commission* ECLI:EU:C:2017:1017, draws attention to this, in para 106.

AG Wahl's Opinion in *Dirk Andres* contains a thorough discussion of the reference system, stating *inter alia* that it is an essential part of the analysis of selectivity, as the comparison necessary in the second limb of the test can only work in light of an objectively defined benchmark.[94] To illustrate the difficulties inherent in such a definition, he argues that under the Commission's own definition in the 2016 Notice, it is possible for "any number of fiscal provisions, or the combination thereof to fit that description".[95] This is to an extent the result of the lack of proper guidance in this definition exercise from the Union judicature's case law.[96] He goes on to say that the reference system in this case is not based upon objective criteria, and that, based on the Court's case law, in the determination of the reference system a "broad approach is favoured", while formalistic approaches should be rejected.[97] Based on those considerations, he gives a very good account of what should, based on the case law, be seen as the reference framework, stating that the "Court has endorsed an approach that seeks to identify the entire body of rules that influence the tax burden weighing on undertakings. In my view, such an approach is warranted. It ensures that the selectivity of a tax measure is assessed against a framework that includes all relevant provisions, and not against provisions that have been carved out artificially from a broader legislative framework".[98] The ECJ explicitly accepted this formulation.[99]

The ECJ reiterated that the selectivity analysis should begin with the identification of a reference framework, stressing the added importance that step has in fiscal cases, given that any comparison, both for determining the existence of an advantage, and for the purposes of the second limb of the selectivity test, necessitates the existence of correctly defined reference framework.[100] The focus of the ECJ's analysis seems to shift in the following paragraphs. At the centre of this part of the judgment are selective systems, like the one that was the subject of the *Gibraltar* case. The Court states that an undertaking may be the recipient of a selective advantage even in cases where it escapes the tax that forms the reference system. The extension of this is a reiteration of the Gibraltar principle, that selectivity can exist even in the lack of a deviation from the reference system.[101] In essence, it is a question of the width of the scope of the reference framework. The same

[94] *Dirk Andres* Opinion of AG Wahl (n 93), paras 98-99
[95] *Ibidem*, para 104
[96] *Ibidem*, para 100, specifically in relation to "unhelpful" terms, such as "common" or "normal" tax regime, which in essence mean nothing without case-specific context, and thusly are of very limited use.
[97] *Ibidem*, paras 105-106
[98] *Ibidem*, para 109
[99] Case C-203/16 P *Dirk Andres (faillite Heitkamp BauHolding) v Commission* ECLI:EU:C:2018:505, para 103
[100] *Ibidem*, paras 88-89
[101] *Ibidem*, para 90

discussion can be found in the other three judgments stemming from the contested Decision, all delivered on the same day.[102]

In the following paragraphs (in all four judgments) the ECJ expanded upon the importance of the scope, by drawing attention to issues stemming from regulatory technique. In essence, a formalistic approach such as the one employed by the Commission and the General Court would result in some national tax rules, that were designed with the "correct" technique falling "from the outset" outside the scope of selectivity, and by extension State aid. This could happen despite the fact that "by adjusting and combining various tax rules, they produce the same effects in law and/or in fact".[103] This of course cannot stand, as the focus of the State aid analysis is the measure's effects, not its objectives, causes, or aims, and by extension the regulatory technique employed.[104] Based on this logic, the ECJ declared that since regulatory technique cannot be used to enable a measure to escape the scrutiny of State aid, it should also be ignored in the determination of the reference framework.[105] In other words, a measure cannot be caught by the State aid prohibition simply as a result of its regulatory technique, in the same way it cannot circumvent the prohibition on the same basis. As Nicolaides points out, this last point seems to be a confirmation and extension of the principle that when determining the reference framework the focus of the analysis should be its effects, rather than its objectives.[106] However, the regulatory technique of a tax measure remains somewhat relevant when it creates a derogation.[107]

The ECJ explained that an "overall examination" of the measures making up the German regime shows that instead of the (a)>(b)>(c)>(d) structure discussed above, which moves from the general to the more specific rules, the correct interpretation of the German system is that (c) and (d) both define situations falling within (b). Thusly, (b) is the correct reference framework, because the selectivity of a tax measure cannot be assessed based on a reference framework made up of provisions artificially removed from a broader legislative framework.[108] Finally, the ECJ confirmed that an error in the determination of the reference framework vitiates the entirety of the selectivity analysis.[109] *In casu*, therefore the exclusion from the

[102] Case C-208/16 P *Germany v Commission* ECLI:EU:C:2018:506, paras 87-89; Case C-209/16 P *Germany v Commission* ECLI:EU:C:2018:507, paras 85-87; Case C-219/16 P *Lowell Financial Services v Commission* ECLI:EU:C:2018:508, paras 92-94
[103] *Dirk Andres* (n 99), para 91
[104] *British Aggregates* (n 10), paras 85, 89; *NOx* (n 34), para 51; and *Gibraltar* (n 20), paras 92-93
[105] *Dirk Andres* (n 99), para 92
[106] Phedon Nicolaides, 'The Definition of the Reference Tax System Is Still a Puzzle' (2018) 17 European State Aid Law Quarterly 419, 422
[107] *Dirk Andres* (n 99), para 93
[108] *Ibidem*, para 103
[109] *Ibidem*, para 107

reference framework of the general loss carry-forward rules meant that the General Court (and the Commission) had erred in law.[110]

There is no doubt that these judgments are noteworthy for their discussion of the importance of the reference framework, and their affirmation and extension of the principles seen in *Gibraltar*. However, it is still not clear how we are supposed to determine the reference framework. Nicolaides, validly, wonders whether problematic companies taken over are "in the set of all companies carrying losses forward or in the set of companies taken over".[111] Since the ECJ unequivocally rejected regulatory technique as a guide to determining the reference framework (and by extension seemingly rejected the formalistic logic that gave rise to the Commission's Decision and the General Court's judgment), it is argued that a more consistent reading of the judgment should place more emphasis on the explicit acceptance of AG Wahl's reasoning in *Dirk Andres*, where the reference framework was theorised as "the entire body of rules that influence the tax burden weighing on undertakings".[112] In such a reading of the case, the reference framework would have to be (b) (as the ECJ found), with (c) and (d) forming part of it. To exclude (c) and (d) from the reference framework, even though they, alongside with (b), form in the eyes of the ECJ the general framework of rules applicable to loss carry-forward would indeed seem artificially narrow. Such an understanding would be more in line with the effects-based approach. In essence, the Court seems to have said that a rule being a derogation from another rule is not sufficient to declare the latter the reference framework, but that an overall assessment of all relevant rules is necessary.[113] Unfortunately, the ECJ did not actually say in detail what exactly constitutes the reference framework, and as such a degree of uncertainty is inevitable. At the end of the day there is still a clear lack of objectivity in the exercise of determining the reference framework.

In the context of *Dirk Andres*, *P Oy* is worth examining. Notably *P Oy* was decided before *Dirk Andres*, but it has been suggested that the Commission Decision that gave rise to *Dirk Andres* influenced the ECJ's judgment in *P Oy*.[114] In that case, there was a scheme in place very similar to the one discussed in *Dirk Andres*. Effectively, the Tuloverolaki, a Finnish law on income tax, provided for the deduction of losses in the following fiscal years,[115] providing for an exception upon

[110] *Ibidem*, para 103
[111] Nicolaides, 'The Definition of the Reference Tax System' (n 106), 427
[112] *Dirk Andres* Opinion of AG Wahl (n 93), para 109; explicitly endorsed by the ECJ in *Dirk Andres* (n 99), para 103
[113] Luc De Broe, 'The State Aid Selectivity-Test in Corporate Tax Matters: CJEU Applies Common Sense in Its Judgments on the German 'Sanierungs'-clause, but Do We Have All Pieces of the Puzzle Now?' (2018) 27 EC Tax Review 285, 287
[114] Traversa (n 85), 522
[115] Case C-6/12 *P Oy* ECLI:EU:C:2013:525, paras 4-5

change of ownership to minimise abuse.[116] This somewhat mirrors the German regime discussed above, and has its roots in the same desire to stop "loss making companies being converted into a commodity".[117] However, the relevant Finnish law provided that the non-deductibility of losses would not apply in cases of a company being inherited, or when the competent tax office decided to allow such a deduction "for special reasons", necessary for the company to continue operating.[118] Those special reasons were detailed in a letter published by the tax authorities.[119] Thus, we have the general rule **(a)** that provides for loss deduction and carry-forward, the scope of which is limited by an anti-abuse rule **(b)** that stipulates that a change in ownership removes the benefit of (a), while rule **(c)** provides that under certain circumstances, under the discretion of the tax authorities, the exception contained in (b) will not apply, allowing for the application of (a). All those rules exist in the context of the general corporate taxation system.

As noted by the referring Court, there are two alternative interpretations of the facts of the case as they pertain to the determination of the reference framework, one being that the reference framework is (a), meaning that (c) is not a derogation as it provides for the same treatment as the general system, and the other being that (b) is the reference system, meaning that (c) is a derogation.[120] The ECJ, with minimal analysis, seemed to suggest that the correct interpretation would be the latter.[121] However, such a reading of the national law is problematic, as it fails to take into account the overall structure of the system, as the only reason (b) exists is to mitigate abusive tax practices stemming from the generality of (a), while the derogation (c) in turn only exists to limit the scope of the blanket ban included in (b). Following AG Wahl's Opinion in *Dirk Andres*, and the proposed reading of that judgment, it follows that the ECJ was not correct in its assessment of the reference framework. What becomes apparent from the discrepancy between *Dirk Andres* and *P Oy* is that the definition of the correct reference framework remains more an art than a science.

The proposed reading of the *Dirk Andres* judgment advocated above seems to be confirmed in the *A-Brauerei* judgment, where the ECJ held that the reference framework was "German law rules on real property transfer tax", taken together.[122] The ECJ effectively held that a tax, and its exemption taken together, formed the reference system. Similarly, in *Sigma Alimentos*, the General Court found that the contested measure was but a modality of the application of a larger system (in this

[116] *Ibidem*, para 6
[117] *Ibidem*, para 8
[118] *Ibidem*, paras 6-7
[119] *Ibidem*, paras 8-9
[120] *Ibidem*, para 13
[121] *Ibidem*, para 32
[122] Case C-374/17 *Finanzamt B v A-Brauerei* ECLI:EU:C:2018:1024, para 37

case the taxation of companies), and thus could not be its own reference system,[123] but rather that the reference system was the entirety of the tax measures dealing with the treatment of goodwill.[124] In *World Duty Free* the ECJ found that the reference system was the general Spanish system for the taxation of companies and, more specifically, the rules relating to the tax treatment of financial goodwill within that tax system.[125] In *GIL Insurance* the ECJ found that the "higher rate of IPT and VAT form part of an inseparable whole".[126] In other words, in those cases, a set of rules was found to be the reference framework, in lieu of an isolated measure cut off from the system it belongs and therefore its context.

Nonetheless, the width of this contextualised reference framework is still uncertain. In *Hungary v Commission*, where the subject of the dispute was the progressivity of a tax on the turnover of advertising activities, the General Court held that the only applicable reference framework could be the entirety of the advertising tax, including the progressive rates and successive bands.[127] A similar conclusion was reached in *Poland v Commission*, where the case again revolved around a progressive tax on turnover, this time of retailers. The General Court held that the only possible applicable reference framework that would not be incomplete or purely hypothetical was the entirety of the retail tax, again with its progressive rates and successive bands.[128] AG Kokott also lends support to this position, arguing that a progressive tax rate is not an exception for certain undertakings to a 'normal' tax rate, but is itself the rule. Under such a rule, all taxable persons are subject to different average tax rates, by design.[129] As Monsenego argues, this interpretation of the reference system criterion is quite functional when it comes to fiscal aid, as even a highly specific tax measure is part of a consistent whole, and cannot be separated from that whole.[130] In other words, a fiscal provision that interacts with other provisions is only meaningful in that context.

In summary, this part has shown that determining the correct reference framework can be particularly difficult in fiscal cases, due to the interplay of several rules operating concurrently. Through the case law, it has been demonstrated that a given factual pattern can be subjected to different readings, and thus different assessments over what actually constitutes a reference framework, leading to

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[123] *Sigma Alimentos* (n 35), para 120. "Modalité" in the French text.
[124] *Ibidem*, para 126
[125] *World Duty Free* (n 28), para 63
[126] Case C-308/01 *GIL Insurance Ltd and Others v Commissioners of Customs & Excise* ECLI:EU:C:2004:252, para 74. "IPT" stands for Insurance Premium Tax.
[127] Case T-20/17 H*ungary v Commission* ECLI:EU:T:2019:448, paras 81-84
[128] Joined Cases T-836/16 and T-624/17 *Poland v Commission* ECLI:EU:T:2019:338, paras 65-70
[129] Case C-75/18 *Vodafone Magyarország Mobil Távközlési Zrt. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága* Opinion of AG Kokott ECLI:EU:C:2019:492, para 164
[130] Jérôme Monsenego, *Selectivity in State Aid Law and the Methods for the Allocation of the Corporate Tax Base* (Kluwer Law International 2018)

potentially different selectivity and aid assessments. Additionally, the case law suggests that the determination of a reference framework should take note of the fiscal context in which the contested measure operates, to allow for a proper analysis of a measure's effects, as opposed to its form. Such an approach essentially allows some scope for the nature of taxation to be examined as part of the selectivity analysis.

d. Conclusion

It is clear that the reference framework needs to be determined independently of the regulatory technique employed and needs to take account of the measure's effects rather than its form, while remaining coherent. In functional terms, it is obvious from the preceding discussion that the reference framework cannot be artificially narrowed. In this context, it is unsurprising that the width of the reference framework can vary wildly, as it needs to look at the effects of the measure. At the same time, the determination of the reference framework does not necessitate that the contested measure be a derogation from it, as a reference framework may be in itself selective, if it is discriminatory and defines a category of recipients which can be identified in advance.

It also appears that for the objectives and effects to be properly analysable it is necessary to look at the "consistent whole" of the relevant provisions, and to not isolate measures from their context and application. Such an approach can be argued to be necessary to allow for the peculiarities of taxation. It is clear that the inherent logic of taxation and that of State aid can clash, meaning that a more fiscal outlook in the context of State aid could be beneficial. As Traversa argues, national corporate taxation systems tend to be complex, and to a certain degree, coherence can only be found "in the simultaneous application of apparently distinct tax provisions, which for this reason should not be treated in an isolated perspective".[131] Luja proposes that the only way to make sense of the CJEU's case law is to determine the reference framework only "by looking at the nature and structure of tax system as a whole and not by the initial tax base alone".[132]

This raises an interesting point as to the rationale of the current approach. The selectivity analysis essentially necessitates the breaking apart of a holistically designed and developed system of taxes that only make sense when operating alongside one another. Finding a reference framework from which one can derogate, necessary as it may be within the framework of the notion of selectivity, fails to take into consideration the fact that a tax system may consist not of a general rule, but of a number of interwoven rules that interact with one another, and can

[131] Traversa (n 85), 520

[132] Raymond Luja, 'Revisiting the Balance between Aid, Selectivity and Selective Aid in Respect of Taxes and Special Levies' (2010) 9 European State Aid Law Quarterly 161, 168

only be coherent as a system when read in conjunction with one another. General exceptions for example, even though they formally derogate from the basic principle, are inherent parts of the logic of the general rule. The general rule from which they derogate can operate at a level of generality that requires every taxable entity to pay its share of taxes exactly because there are derogations allowing the State to achieve policy aims *through* its tax system, including purely fiscal objectives such as operating a tax system based on the ability to pay principle, or redistribution. It emerges from the more recent case law of the CJEU that it is indeed possible to allow for a consideration of the "consistent whole" to be taken into account when determining the reference framework.

Given the inherent complexities of general taxation it is submitted that this holistic approach should become the norm. First of all, it allows for a complete definition of the "normal" market conditions, which is a significant part of what the reference system is examining and trying to define. The questions and occasional furore surrounding the width of the framework are quelled, as its width is dependent on the specificity of the rules examined. Additionally, under such an approach it would be necessary to look at the nature and structure of the tax system as it operates, and not necessarily at the initial tax base as defined by the basic legal framework, meaning that a holistic approach would be more in line with an effects-based approach and will not run the risk of getting bogged down in the formalism apparent in the first instance judgments on the *Sanierungsklausel* Decision, or the *P Oy* judgment. Beyond this, if the reference framework is defined as the coherent sum, or inseparable whole, of the interwoven fiscal rules applicable to a given situation (and as a result the undertakings that find themselves in it), the *Gibraltar* approach of *de facto* material selectivity actually feels more comfortable, as it allows the effects of a given cluster of measures to shine through, actually limiting the potential for regulatory technique. The same can be argued in relation to the self-referential nature of the levy in *British Aggregates*. This outlook could also bring the *Gibraltar* and *Dirk Andres* rationales closer, as both stress different sides of the irrelevance of regulatory technique,[133] and can thus be argued to be two sides of the same anti-formalistic, functional coin. In other words, this approach would still allow for selective systems to exist, and would thus not limit the effective scope of the notion of selectivity. Therefore, beyond its benefits, the proposed holistic approach arguably follows from well-established case law as well. At the same time, a holistic approach could be seen as a move towards a more fiscal outlook in relation to fiscal aid, an outlook which can better deal with the inherent complexities of taxation by first and foremost recognising their existence. Further, the more fiscal outlook which would follow from the adoption of a holistic approach, would allow for the actual effects of a given measure to shine through, as it would in effect

[133] De Broe (n 113), 287

necessitate the careful analysis of the fiscal context, and maintain the exclusion of secondary selective effects from the scope of fiscal aid. Such an approach, as will be discussed below, can also allow for a better comparability analysis in the second step, as the limits of the comparable situation are clearly defined.

III. Step Two

Once the reference framework has been established, the second step of the selectivity test can be examined. In this step, it must be determined whether a derogation from the reference framework differentiates between economic operators which, in light of the objectives of the system, are in a comparable legal and factual situation. This is the part of the test that establishes *prima facie* selectivity, subject to the caveat of the third and final step. The comparability analysis is preoccupied both with the notion of equality, and the distortive effects of the aid.[134]

In some cases, a derogation is not *per se* necessary.[135] This is the case when the reference framework itself creates a difference in treatment.[136] The principle that derogations are not always necessary can be found in *British Aggregates*, where the reference framework was a specialised levy itself.[137] That levy was very narrowly devised, exempting *ab initio* some types of aggregates. Due to State aid being concerned with effects over form, the regulatory narrowness employed by seemingly general measures, or at the very least measures that are capable of forming the reference framework can backfire. However, in most cases a derogation from normal taxation will be necessary, to introduce the differentiation in treatment in light of the objectives of the reference framework or the measure, and to facilitate the analysis.[138] The fact that a derogation is not present however does not mean that it is possible to move straight into the third step of the selectivity test. Rather, as shown by *British Aggregates* and *Gibraltar*, the measure in question is *prima facie* selective exactly because it provides for different treatment between undertakings that are in a comparable legal and factual situation in light of the objectives of the reference framework or the measure.[139] It follows from this that the comparability analysis still needs to be undertaken even in the absence of a derogation, as it is the very heart of the second step of the selectivity test.

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[134] Case C-53/00 *Ferring SA v Agence centrale des organismes de sécurité sociale* Opinion of AG Tizzano ECLI:EU:C:2001:253, paras 35-38; Andrea Biondi, 'State Aid is Falling Down, Falling Down, Falling Down: An Analysis of the Notion of Aid" (2013) 50 Common Market Law Review 1719, 1730 -1733

[135] 2016 Notice (n 11), para 129; *World Duty Free* (n 28), para 77

[136] *Gibraltar* (n 20), paras 92-102; *Dirk Andres* (n 99), para 92

[137] *British Aggregates* (n 30), paras 49-51

[138] *World Duty Free* (n 28), para 77

[139] *British Aggregates* (n 10), paras 87-88; Case C-487/06 P *British Aggregates Association v Commission* Opinion of AG Mengozzi, ECLI:EU:C:2008:419, paras 97-99; *Gibraltar* (n 20), para 101

This section will first look at the objectives that inform this comparability analysis, before then examining that comparability analysis. Using those two parts, this section will then discuss the Spanish Goodwill saga, and its implications and importance for the second step of the selectivity test.

a. Objectives of the Measure, Objectives of the System

It is clear that this part of the test relies to an extent on the objectives of the contested measure.[140] This is a relatively new development, formally introduced in the logic of the analysis of fiscal selectivity, as Bartosch says, with the *Adria-Wien* judgment.[141] It is arguable that such considerations were already present in the ECJ's case law,[142] but it was *Adria-Wien* that first offered a clear statement of this principle. The contested measure, the Energieabgabenvergütungsgesetz, provided for a rebate only available to undertakings that were primarily producers of goods, while it did not apply to undertakings providing services.[143] The ECJ observed that the nature of the scheme in place could not provide any justification for the difference in treatment, while the same applied to the ecological considerations informing the scheme, as energy consumption, be it from manufacturers or service providers, is equally damaging to the environment.[144] The Court declared that the comparison exercise in the second step of the analysis of selectivity needed to be undertaken in the context of the objective pursued by the Energieabgabenvergütungsgesetz.[145] The ECJ in that case placed emphasis on the objectives pursued by the contested measure, as the analysis of those objectives was necessary to conduct a fruitful comparability analysis, given that the rationale of the contested measure was not based on general fiscal principles, but rather had environmental aims.

Thus, despite State aid being an objective construct to be analysed based on its effects, the objectives underpinning the contested measure are important in determining the limits of the comparability analysis. This links the first two steps of the test to an extent, as the objective of a measure will follow from the reference framework, and the width of the two will be interlinked. If, for example, the general system of property taxation is taken as the reference framework, as was the case in *Concello de Ferrol*, then its objective would be taxing the ownership or use of land.[146] On the other hand, if the reference framework was taken as being the tax exemption for state-owned land and land used for the purposes of national security,

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[140] *Spain v Commission* (n 10), para 47

[141] Andreas Bartosch, 'Is there a need for a Rule of Reason in European State Aid law? Or how to Arrive at a Coherent Concept of Material Selectivity?' (2010) 47 Common Market Law Review 729, 734

[142] *Belgium v Commission* (n 10), paras 28-31

[143] *Adria-Wien* (n 15), paras 3-11

[144] *Ibidem*, paras 49-53

[145] *Ibidem*, para 41

[146] *Concello de Ferrol* (n 10), paras 36-38

then the objective of the measure would be related to national defence.[147] Objectives can be classified as intrinsic or extrinsic (also seen in academic writing, judgments, and Decisions as "internal" or "inherent" and "external") to the system or measure. Intrinsic objectives relate to taxing something,[148] while extrinsic objectives on the other hand are more varied; examples include environmental,[149] social,[150] security[151] and other considerations. However, it is important to note that a measure cannot escape classification as State aid solely based on its objectives.[152]

Despite the obvious importance of the objectives of a given measure or system, the case law is not clear in relation to which objectives are the relevant ones. First of all, when it comes to taxation, it is imperative to distinguish between the objectives attributed to a tax scheme, and "the mechanisms inherent in the tax system itself, which are necessary for the achievement of such objectives".[153] In *Portugal v Commission* for example the policy objective of the tax scheme (a tax reduction) was to alleviate commercial disadvantages stemming from the insularity of the Azores, but the inherent structural objective of the system was "the allocation of the tax burden in accordance with ability to pay, with the aim of redistribution".[154] Based on the objective of the *system*, the Court found that the extension of the exemption to all taxpayers was not justifiable, as the generality of it could not ensure that the "ability to pay" element of the system was observed.[155] In *P Oy*, the objective of the system on loss carry-forwards was in line with the general system of taxation, but the objectives of the derogation were not, as they were unrelated to the structure of the general system.[156]

The objective of the system in *Paint Graphos* was the taxation of corporate profits (in other words, to raise money for the state).[157] In *3M* the objective of the measure in question (a tax amnesty) was held to be "ensuring compliance with the

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[147] *Ibidem*, para 28
[148] *Ibidem*, para 38; *GIL Insurance* (n 126), para 14
[149] Case C-169/08 *Presidente del Consiglio dei Ministri v Regione Sardegna* ECLI:EU:C:2009:709, para 33; *British Aggregates* (n 10), para 161; *Adria-Wien* (n 15), para 52; *NOx* (n 34), para 74; Case C-5/14 *Kernkraftwerke Lippe-Ems GmbH v Hauptzollamt Osnabrück* ECLI:EU:C:2015:354, para 77
[150] *France v Commission* (n 10), paras 13, 16
[151] Case T-55/99 *Confederación Española de Transporte de Mercancías (CETM) v Commission* ECLI:EU:T:2000:223, paras 54, 115
[152] *France v Commission* (n 10), para 21; Case C-342/96 *Spain v Commission* ECLI:EU:C:1999:210, para 23; *Belgium v Commission* (n 10), para 25; *Adria-Wien* (n 15), para 53; *British Aggregates* (n 10), para 84
[153] *Portugal v Commission* (n 21), para 81
[154] *Ibidem*, paras 41, 82
[155] *Ibidem*, paras 82-83
[156] *P Oy* (n 115), para 26-30
[157] *Paint Graphos* (n 17), para 54. See also: Case T-512/11 *Ryanair Ltd v Commission* ECLI:EU:T:2014:989, para 83

principle that judgment must be given within a reasonable time".[158] In *A-Brauerei* the objective of the system was found to be "to tax any transfer of the right of ownership in a property".[159] In *Osnabrück* it was held that the "polluter pays" environmental principle was part of the objective of an excise duty on the use of nuclear fuel in energy production, as that charge was designed to reduce the budgetary burden of safely dealing with nuclear waste.[160] In *Sardegna*, the objective of the measure was environmental, in particular the alleviation of damage caused by tourism.[161] It is clear that the objectives' scope can itself vary, from general principles of taxation to specific, regional, environmental or other policy. The objective of the measure, especially if said objective relates to economic or financial policy, is not in itself sufficient to place the measure outside the scope of Article 107(1), as such an approach would negate the usefulness of the State aid prohibition.[162]

Despite the importance of the determination of the objectives, it is not obvious whether the objectives that ought to be examined are those of the measure,[163] or those of the statutory scheme or system,[164] as shown by the differing focus of the objectives described. The General Court has also pointed at this discrepancy.[165] Those two approaches, as similar as they may appear, are not identical, as a "measure" can have much narrower objectives than a "system". As Bartosch explains, the former interpretation could theoretically be used to justify laser-guided measures, "even applying to only one single undertaking".[166] Equally, the scope of their effects can vary wildly. A good example of that uncertainty would be the aforementioned *Gibraltar* case, where the ECJ used the revenue-raising objective of the tax system to undertake the comparability analysis.[167] In *World Duty Free* the ECJ stated that the objectives that need to be taken into account are those of the reference framework.[168] This confirms a trend that is apparent in *Paint*

[158] Case C-417/10 *Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v 3M Italia SpA* ECLI:EU:C:2012:184, para 42
[159] *A-Brauerei* (n 122), para 39
[160] *Hauptzollamt Osnabrück* (n 149), para 78
[161] Case C-169/08 *Presidente del Consiglio dei Ministri v Regione Sardegna* Opinion of AG Kokott ECLI:EU:C:2009:420, para 136-137
[162] Joined cases T-346/99, T-347/99 and T-348/99 *Territorio Histórico de Álava - Diputación Foral de Álava, Territorio Histórico de Guipúzcoa - Diputación Foral de Guipúzcoa and Territorio Histórico de Vizcaya - Diputación Foral de Vizcaya v Commission* ECLI:EU:T:2002:259, para 54; *CETM* (n 151), para 53. See also: *France v Commission* (n 10), para 21; *Spain v Commission* (n 152), para 23; *Belgium v Commission* (n 10), para 25 *Adria-Wien* (n 15), para 53; *British Aggregates* (n 10), para 84
[163] *Spain v Commission* (n 10), para 47
[164] *GIL Insurance* (n 126), para 68; *Heiser* (n 10), para 40
[165] Case T-399/11 RENV *Banco Santander and Santusa v Commission* ECLI:EU:T:2018:787, para 144; Case T-219/10 RENV *World Duty Free Group SA v Commission* ECLI:EU:T:2018:784, para 143
[166] Bartosch, 'A Rule of Reason in European State Aid Law' (n 141), 742
[167] *Gibraltar* (n 20), para 101
[168] *World Duty Free* (n 28), paras 57-60

Graphos,[169] *Portugal v Commission*,[170] and *Hansestadt Lübeck*,[171] which suggests that the "objectives of the measure" formulation of *Adria-Wien* has been replaced by the "objectives of the system" one, or at the very least the "objectives of the reference framework" one. It is clear that the newer formulation allows for a far wider comparability analysis, by focusing on wider objectives. The General Court has explicitly endorsed the wider position,[172] but nonetheless a lack of clarity persists. This for example can be evidenced by the fact that in *World Duty Free* the ECJ relies for this finding on *MOL Magyar*,[173] but in the paragraph of *MOL Magyar* referred to, the Court clearly refers to the objective of the measure, not that of the system.[174]

This Part has aimed to demonstrate the importance of the objectives informing the measure or system, and as such the entirety of the comparability analysis on which selectivity hinges. It has also showcased the clear lack of consistency in the definition and scope of those objectives. This lack of consistency in the definition of the objectives of the tax measure or system is a reflection of the definitional difficulties discussed in the analysis of the first step, as the under the current trend in the case law the objectives of the reference framework or general system will likely be deemed the relevant ones. Additionally, it further showcases the importance of the correct determination of the reference framework, as mistakes can spill over into the analysis of the second and potentially third step, thus vitiating the entirety of said analysis.[175]

b. Comparable Legal and Factual Situation

The second half of the second step in a fiscal selectivity examination is the comparability analysis, under which the Commission has the responsibility to demonstrate that a tax measure introduces a difference in the treatment of comparable undertakings.[176] Beyond the objectives of the measure or system discussed above, arguably another element that can inform this analysis is the competitive relationship between recipients and non-recipients.[177] In *Paint Graphos* the ECJ held that the core of the "derogation" or difference from the reference framework can only be ascertained by looking at the differentiation in treatment between economic operators who "in light of the objective assigned to the tax system of the Member State concerned, are in a comparable factual and legal

[169] *Paint Graphos* (n 17), paras 49, 63-64
[170] *Portugal v Commission* (n 21), para 54
[171] *Hansestadt Lübeck* (n 37), para 54
[172] *Santander* (n 165), para 146; *World Duty Free* (n 165), para 145
[173] *World Duty Free* (n 28), para 60
[174] Case C-15/14 P *Commission v MOL Magyar Olaj- és Gázipari Nyrt* ECLI:EU:C:2015:362, para 61
[175] *Dirk Andres* (n 99), para 107
[176] *NOx* (n 34), para 62
[177] Phedon Nicolaides and Ioana E Rusu, 'The Concept of Selectivity: An Ever Wider Scope' (2012) 11 European State Aid Law Quarterly 791, 802

situation".[178] This is because the actual effects of the derogation need to be examined, as opposed to its mere existence. This part will look into this comparable situation and discuss its application, and the analysis that needs to be undertaken.

The comparability analysis between undertakings needs to be carried out in light of the objectives of the system or measure as set out above. This can be illustrated through the Italian banking cases, where Italian banks on the receiving end of favourable tax provisions (applicable only to banks) were found to be in a comparable situation, under the objectives of the general corporate tax system that was employed as the frame of reference, with undertakings in other sectors that, naturally, could not make use of the specific banking sector provisions.[179] In the same vain, in *Concello de Ferrol*, where an undertaking operating under the ambit of the Spanish Ministry of Defence, for the purposes of national security, was granted an exemption from the payment of property taxes, it was held that all undertakings that owned or used land (and were as a result liable to pay property taxes) were in a comparable situation with the undertaking in question, not just those using land for purposes related to national defence.[180] On the other hand, it is worth mentioning the *Osnabrück* case, where a measure placed a special excise duty on the use of nuclear fuel, thusly affecting the price of electricity produced through nuclear fission. The ECJ held that undertakings producing electricity through other means, were not in a comparable legal or factual situation in light of the objectives of the excise duty.[181]

This means that where the objectives of a general system are taken into account, all undertakings liable to pay tax are in a comparable situation.[182] On the other hand, where the narrower, more specific objectives of the measure are taken into account, comparability is limited to the undertakings for whom those objectives are relevant.[183] If the objectives of the reference framework are deemed to be the relevant ones, then their width will depend on that of the framework itself. In *Paint Graphos*, cooperative societies were not liable for tax. The ECJ compared in detail the legal and factual situation of cooperative and non-cooperative corporate entities, in the context of general corporate taxation. The focus of the analysis was

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[178] *Paint Graphos* (n 17), para 49

[179] Case C-222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA* ECLI:EU:C:2006:8, paras 134-138; Case C-66/02 *Italy v Commission* ECLI:EU:C:2005:768, paras 96-100; Case C-148/04 *Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio Genova 1* ECLI:EU:C:2005:774, paras 46-50

[180] *Concello de Ferrol* (n 10), para 40

[181] *Hauptzollamt Osnabrück* (n 149), para 79

[182] *Cassa di Risparmio di Firenze* (n 179), paras 134-138; *Italy v Commission* (n 179), paras 96-100; *Unicredito Italiano* (n 179), paras 46-50; *Concello de Ferrol* (n 10), para 40; Case C-458/09 P *Italy v Commission* ECLI:EU:C:2011:769, paras 55-61

[183] *Hauptzollamt Osnabrück* (n 149), para 79; *3M Italia* (n 158), para 42

the different legal form of the two types of entities, the differences in governance,[184] the mutualistic nature of cooperatives and their economic situation,[185] the fact that assets and profits are not distributed as dividends, the fact cooperatives have to rely on their own revenue-raising activities, and their low profit margins.[186] Following that analysis, the ECJ concluded that, in principle, in light of the objective of the taxation of profits, the two types of entities were not in a comparable situation with each other.[187] A substantive, material analysis such as the one conducted and endorsed by the ECJ in *Paint Graphos* is necessary to evaluate the specifics of the case. Only such a complete and substantive analysis can be actually focused on the contested measure's effects.

In *ANGED* for example, the objective of the measures was to "contribute towards environmental protection and town and country planning", in order to counteract the consequences of the large retail establishments.[188] The ECJ recognised that the environmental impact of retail establishments correlates to their size, while the same is true in regards to their effect on town planning. Thus, the size-based thresholds were held to be consistent with the objectives of the measures.[189] This in turn means that the size-based thresholds employed by each of the regional authorities did indeed differentiate between undertakings, but those undertakings were not in a comparable legal and factual situation based on the objectives of the measures.[190]

Further, all the measures included exemptions for certain types of undertakings. Looking at a formal derogation rather than the *ab initio* exclusion found in the size-specific exemption, the ECJ again examined the situation of the exempted undertakings in comparison with the large retail establishments that were to be fully taxed. All three regional authorities submitted that the exempted categories required by their very nature large retail areas, and therefore their size was not intended to attract the greatest number of consumers, and thus cause increases in traffic. Therefore, it could be argued that the exempted and non-exempted undertakings were not in a comparable legal and factual situation.[191] Finally, the Catalan measure also included an exemption for collective large retail establishments. The ECJ compared the collective and individual retail establishments in light of the objectives of the measure and concluded that they

[184] *Paint Graphos* (n 17), paras 55-57
[185] *Ibidem*, para 58
[186] *Ibidem*, paras 56-57, and 59
[187] *Ibidem*, para 61
[188] *ANGED v Catalunya* (n 75), para 52; *ANGED v Asturias* (n 75), para 45; *ANGED v Aragón* (n 75), para 40
[189] *Ibidem*, paras 53-54; paras 46-47; and paras 41-42, respectively
[190] *Ibidem*, para 55; para 49; and para 45, respectively
[191] *Ibidem*, paras 57-60; paras 51-54; and paras 47-50, respectively

were indeed comparable.[192] The form and content of the comparability analysis were mostly supported by AG Kokott.[193] She also stated that comparability effectively needs to follow from the reference framework and be subject to potential justifications, as fiscal advantages can by definition only be granted in the context of the tax system, and that context and its intricacies need to be taken into account.[194]

Another interesting example is the Dutch *NOx* case, which concerned an environmental levy on nitrogen oxide (NOx) emissions above a certain limit, which also introduced an emissions trading scheme for large industrial facilities. Those larger facilities, and only those facilities, would be fined, if they exceeded the emissions' levels. The General Court concluded that the bigger facilities were not in a comparable legal and factual situation in the context of the objective of the measure, which was the reduction of emissions,[195] since they would be the only ones that could be potentially fined, and therefore were not subject to the same obligations.[196] The ECJ disagreed with the EGC. Even though both Courts examined the measure in the context of the same objective, the ECJ found that all the undertakings that had to comply with the emission reduction obligation, regardless of whether they could be fined, were in a comparable legal and factual situation.[197] The two Courts seem to have examined the objective of the measure with a different scope, with the ECJ disregarding the different obligations embedded in the contested measure, as they were not *per se* consistent with the general objective of emissions' reduction. As Werner and Stoican point out, this judgment confirms a wide interpretation of the comparable situation, and therefore State aid.[198] Essentially, the ECJ seems to have decided that despite the fact that the measure in question clearly defined the undertakings to which it would fully apply, there was an even wider benchmark against which the defined recipients should be compared.

From this Part, it becomes clear that the comparability analysis is not, or at the very least should not, be a formulaic box-ticking exercise. The context in which it needs to be undertaken informs its limits, and its rationale. It is at its very core a pragmatic, effects-oriented analysis, that needs to examine in detail the contested measure, as shown in *ANGED* or *Paint Graphos*. However, the limits of this analysis, which demarcates the two categories to be compared, recipients and non-

[192] *ANGED v Catalunya* (n 75), para 61
[193] *ANGED v Catalunya* Opinion of AG Kokott (n 77), para 90-102; *ANGED v Asturias* Opinion of AG Kokott (n 77), para 88-97; *ANGED v Aragón* Opinion of AG Kokott (n 77), para 90-101
[194] *Ibidem*, paras 79-80; paras 77-78; paras 79-80, respectively.
[195] Case T-233/04 *Netherlands v Commission* ECLI:EU:T:2008:102, para 86
[196] *Ibidem*, para 89-91
[197] *NOx* (n 34), paras 62-64
[198] Philipp Werner and Lucia Stoican, 'The *NOx* Case – Still Trying to Fit in a System' (2018) 17 European State Aid Law Quarterly 101, 105

recipients, are not set in stone, and can extend to be particularly wide, as shown by *NOx*. The cases discussed showcase the need for a substantive comparability analysis.

c. The Spanish Goodwill Saga and Its Context

What becomes apparent from the discussion of the "comparable legal and factual situation" thus far is the potential difficulty in differentiating between a measure available to all comparable undertakings in theory and in practice. The ECJ dealt with this issue in *World Duty Free*. That case was the culmination of the Spanish Goodwill Saga, where the Commission based a finding of selectivity on the fact that the treatment of undertakings carrying out certain types of investments abroad differed from that of undertakings that did not.[199]

The General Court overturned the Commission's Decision and adopted a (much) narrower approach: it held that the fact that a tax measure was an exception from the reference framework was not sufficient to consider that the measure was selective, particularly when the measure was potentially accessible to all undertakings and had no differentiation baked into its criteria. [200] Rather, the Spanish law was aimed to a category of economic transactions, that could potentially be carried out by undertakings in a comparable legal and factual situation. The General Court concluded that since the measure was potentially accessible to all, it was not selective, but rather it was a general measure.[201] However, the ECJ disagreed with the General Court, arguing that its approach would narrow the scope of selectivity by introducing both a requirement that beneficiaries of alleged aid needed to be distinguished from other undertakings, as well as a limitation to comparability based on accessibility.[202]

According to the ECJ, the measure had the effect of differentiating between comparable undertakings, and as such was selective.[203] Even a seemingly general measure with a condition attached can be selective, if that condition leads to a distinction being made between comparable undertakings, as "it represents discrimination against undertakings which are excluded from it".[204] However, the conditionality of the advantage is not in itself sufficient to render the measure selective.[205] The use of the term "discrimination" in this part of the analysis is particularly interesting, especially because in this case, factually, we are looking at

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[199] Commission Decision 2011/282/EU of 12 January 2011 on the tax amortisation of financial goodwill for foreign shareholding acquisitions No C 45/07 implemented by Spain [2011] OJ L 135/1, recital 89

[200] *Santander* (n 28), para 72; Case T-219/10 *Autogrill España* (n 28), para 68

[201] *Ibidem*, para 48; para 44, respectively

[202] *World Duty Free* (n 28), paras 71, 78

[203] *Ibidem*, para 79

[204] *Ibidem*, para 86

[205] *Ibidem*, para 59

reverse discrimination.[206] The Court reiterated that even if the condition to receive the benefit is carrying out "specified transactions", the measure can still be selective,[207] meaning that the fact that the measure was open to potentially all undertakings is irrelevant.[208] In this instance the Court seems to be departing from the notion of a "privileged category" established in *Gibraltar*.[209] The ECJ seems to have, based on its case law, clarified what constitutes the bare minimum necessary in order to establish the selectivity of a measure that derogates from a general scheme, holding that is sufficient to "demonstrate that that measure benefits certain operators and not others" in a comparable situation.[210] However, the ECJ did not decide whether the two groups of undertakings (those who benefited and those who did not) are indeed in a comparable situation, but referred the case back to the General Court.[211] The ECJ has since reiterated the formulation discussed above in numerous cases.[212] Indeed, as Giraud and Petit explain "this judgment will certainly be quoted and, after *Adria-Wien*, will certainly become the new mantra of the Commission and the EU Courts".[213]

Given the apparent importance of the judgment, it is necessary to briefly set out the principles that emerge from it, removed from the specifics of the case. First of all, the Court reiterated the three-step test,[214] meaning that the general structure of the selectivity analysis of fiscal measures remains the same. In this context, it clarified the importance of conducting the comparability analysis of the second step in light of the objectives of the *system*,[215] and added that the difference in treatment can be classified as "discriminatory".[216] The focus on the difference being "discriminatory" is not alien to the concept of State aid,[217] and is in line with the effects-based approach.[218] It has actually featured a lot in more recent judgments,

[206] The acquisition of shares in Spain is excluded from the scope of the tax advantage, while similar acquisitions in other Member States are rewarded. It is a purely internal situation. The ECJ affirmed this position in para 110 of *World Duty Free* (n 28)
[207] *Ibidem*, para 88
[208] *Ibidem*, para 70
[209] *Gibraltar* (n 20), para 104. See also: Case C-66/14 *Finanzamt Linz v Bundesfinanzgericht, Außenstelle Linz* Opinion of AG Kokott ECLI:EU:C:2015:242, para 109
[210] *World Duty Free* (n 28), para 76
[211] *Ibidem*, para 123
[212] See, for example Case C-128/16 P *Commission v Spain and Others* ECLI:EU:C:2018:591, paras 68-70; *A-Brauerei* (n 122), paras 22-25; *Lowell Financial* (n 102), paras 85-88; Case C-493/15 *Agenzia delle Entrate v Marco Identi* ECLI:EU:C:2017:219, paras 25-27
[213] Adrien Giraud and Sylvain Petit, 'Bury Them Deep: The Court of Justice Annuls the Autogrill and Banco Santander Judgments of the General Court' (2017) 16 European State Aid Law Quarterly 310, 314
[214] *World Duty Free* (n 28), paras 57-58
[215] *Ibidem*, para 57
[216] *Ibidem*, para 54
[217] See for example: *Gibraltar* (n 20), para 101
[218] *World Duty Free* (n 28), paras 75, 79

where the ECJ has held that a non-discrimination approach is inherent in the concept of selectivity.[219]

Beyond those restatements and clarifications however, the judgment in *World Duty Free* has some problematic extensions. First of all, the Court stated that the conditionality of an advantage can in itself be "grounds for a finding that that aid in selective",[220] even if the conditions are not discriminatory.[221] Essentially, a transactional condition, open to and satisfiable by any operator in the defined comparable legal and factual situation can still be selective.[222] This in effect makes the *behaviour* of the pool of potential recipients of the aid the determining factor, as the difference in treatment does not result from state-sanctioned limitations of applicability, but rather from the choices each potential recipient makes. It is that behaviour, that choice, *in casu*, to invest or not to invest, that delineates the two categories. This "behavioural" selectivity is one of the worrying aspects of the judgment, because the two categories of comparable undertakings, recipients and non-recipients are defined not by the contested measure or by any characteristic inherent in them, but rather by *their* choices; in other words the State's influence or discretion on who benefits from an advantage is non-existent. There is no reason why this cannot be applied to, for example, capital allowances or exemptions for Research and Development. The logical extension of this reasoning is that any non-compulsory general measure can be selective, because an undertaking selected not to participate in it.

In order to fully appreciate what the *World Duty Free* judgment means in this context, some analysis of subsequent case law in necessary. In *Commission v Spain*, Spain introduced a complex tax lease system which conditionally allowed for tax advantages to accrue to a specialised investment vehicle, in which any undertaking could participate. The ECJ, applying the rationale developed in *World Duty Free*, argued that it was irrelevant that the specified financial transaction was available to all, as the tax lease system still discriminated between the undertakings that participated in the scheme, and those that did not.[223] On the contrary, in

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[219] Case C-15/14 P *Commission v MOL Magyar Olaj- és Gázipari Nyrt* Opinion of AG Wahl ECLI:EU:C:2015:32, paras 47, 54; *MOL Magyar* (n 174), para 59, with reference to AG Wahl's Opinion cited above; *Belgium v Commission*, Opinion of AG Bobek (n 22) para 29; Case C-518/13 *Eventech Ltd v The Parking Adjudicator* Opinion of AG Wahl ECLI:EU:C:2014:2239, paras 32-33; Case C-518/13 *Eventech Ltd v The Parking Adjudicator* ECLI:EU:C:2015:9, paras 49-55; Case C-100/15 P *Netherlands Maritime Technology Association v Commission* ECLI:EU:C:2016:254, paras 85-86

[220] *World Duty Free* (n 28), para 86

[221] *Ibidem*, para 87. In effect, an advantage conditional, for example, on the investment of 2.5bn Spanish Pesetas, as was the case in Case T-227/01 *Diputación Foral de Álava and Gobierno Vasco v Commission* ECLI:EU:T:2009:315, even though based on objective criteria, does indeed discriminate, *ab initio*, between undertakings that can afford such an investment, and those that cannot. To that effect see paras 162-166 of that judgment.

[222] *World Duty Free* (n 28), para 88

[223] *Commission v Spain* (n 212), paras 70-72

Netherlands Maritime, which again revolved around a tax lease system, the ECJ held that since the measure was open in principle to any undertaking, it was not selective.[224] The ECG, whose judgment the ECJ upheld, in effect argued that since in principle any undertaking, regardless of its size or the sector in which it is active, could benefit from the measure, the measure had to be deemed to be selective.[225] This discrepancy between two very similar cases demonstrates that there is a degree of confusion in relation to the potential selectivity of general measures.

It is clear that the apparent confusion partly stems from the *Gibraltar* judgment, where the analysis hinged on the identification of an *ab initio* privileged category, that would clearly benefit from the application of an otherwise general measure.[226] That category, in other words was *ex ante* identifiable. There was nothing a bricks-and-mortar undertaking could conceivably do to benefit from the same advantages granted to offshore companies. Hence, it was indeed reasonable for the ECJ to reach the conclusion it reached.[227] Even though this approach was accepted in *Netherlands Maritime*,[228] in *World Duty Free* it was clearly and explicitly abandoned with the ECJ chastising the General Court for applying it, claiming this approach was tantamount to the creation of an additional step in the selectivity analysis.[229] In effect, this reasoning means that the ECJ gladly accepted that the differentiation resulting from the operation of the system was selective. This illustrates, in the author's opinion, the basic inherent problem with the reasoning of *World Duty Free*. The judgment commits to a line of thought that refuses to recognise the generality of the application of derogations that is inherent in fiscal systems. Specifically, it declares that a "measure conferring a tax advantage of general application" will be selective, if it derogates from the normal or ordinary tax system, introducing "through its actual effects" a difference in treatment.[230] Essentially, the rationale of *World Duty Free* gets rid of the word "*certain*", which can be found in the wording of Article 107(1), qualifying the undertakings or sectors benefitting from the advantage. This in itself can be problematic, as it significantly alters the scope of the notion of selectivity, by failing to exclude general measures.[231] As AG Darmon explained in *Sloman Neptun*, selectivity is the criterion

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[224] *Netherlands Maritime* (n 219), para 88. Case T-140/13 *Netherlands Maritime Technology Association v Commission* ECLI:EU:T:2014:1029, paras 93, 96-99, 107-111

[225] *Netherlands Maritime* (n 224), paras 97-99

[226] *Gibraltar* (n 20), para 104

[227] AG Kokott has argued that "requiring that there should be – as the Court of Justice put it in the judgment in *Gibraltar* – a category of undertakings privileged by the tax regime in question by virtue of the properties which are specific to them, is […] justified". See: *Finanzamt Linz* Opinion of AG Kokott (n 209), para 109.

[228] *Netherlands Maritime* (n 219), para 88

[229] *World Duty Free* (n 28), paras 71-74. See also in this context the EGC's approach: Case T-219/10 *Autogrill España* (n 28), paras 41-45, 67-68; *Banco Santander* (n 28), paras 45-49, 71-72

[230] *World Duty Free* (n 28), para 67

[231] *Finanzamt Linz* Opinion of AG Kokott (n 209), para 115. See also: 2016 Notice (n 11), para 120

most fit to perform the essential, for the scope of the aid prohibition, role of differentiating between general measures and State aid.[232] Losing the word "*certain*" from the formulation therefore widens the notion of fiscal aid as a whole, not just of fiscal selectivity. Thus, the erasure of "certain" can bring general measures within the (expanded) scope of the State aid prohibition.

d. *World Duty Free* and General Measures

The judgment in *World Duty Free*, in the author's view, is based on a fundamental misunderstanding of "general measures". As AG Jacobs explained in *France v Commission*, the application of aid rules to general measures can be tricky, as it is not easy to distinguish between aid and socioeconomic policy.[233] In other words, the distinction between general and selective measures determines the limits of fiscal State aid control.[234] AG La Pergola also drew a distinction between general measures and situations where "the sectoral nature of the measures emerges […] from the very wording of the disputed measures".[235] Jaeger argues that provisions where the beneficiaries are in no way determined or determinable at the time of the entry into force of the contested measure are not selective,[236] presumably because the measure at hand does not have a ratione personae, a ratione materiae or a ratione territoriae.[237]

This line of thought, contrary though it may be to the ECJ's approach in *World Duty Free*, stems from a careful reading of the case law on general measures.[238] For example, a Belgian measure that provided for a reduction in employer's social security contributions on the condition of the introduction of shorter working hours was deemed to be a general measure.[239] In *MOL Magyar*, the Court recognised that

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[232] Joined Cases C-72/91 and C-73/91 *Firma Sloman Neptun Schiffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG* Opinion of AG Darmon ECLI:EU:C:1992:130, para 47

[233] Case C-241/94 *France v Commission* Opinion of AG Jacobs ECLI:EU:C:1996:195, para 30. See also: Case C-189/91 *Petra Kirsammer-Hack v Nurhan Sidal* Opinion of AG Darmon, ECLI:EU:C:1992:458, paras 57-65

[234] Joined cases C-400/97, C-401/97 and C-402/97 *Administración General del Estado v Juntas Generales de Guipúzcoa and Diputación Foral de Guipúzcoa, Juntas Generales d'Alava and Diputación Foral d'Alava, and Juntas Generales de Vizcaya* Opinion of AG Saggio ECLI:EU:C:1999:340, para 33; Cees Peters, 'Tax Policy Convergence and EU Fiscal State Aid Control: In search of Rationality' (2019) 28 EC Tax Review 6, 7, 9

[235] Case C-75/97 *Belgium v Commission* Opinion of AG La Pergola ECLI:EU:C:1998:534, para 18

[236] Thomas Jaeger, 'Tax Measures' in F J Säcker and F Montag (eds) *European State Aid Law* (Beck Hart Nomos 2016), para 42

[237] Christoph Arhold, Viktor Kreuschitz, Franz Jürgen Säcker, Ulrich Soltesz, Michael Shuette, Andreas Schwab, 'Article 107 TFEU' in F J Säcker and F Montag (eds) *European State Aid Law* (Beck Hart Nomos 2016), paras 415-435

[238] See for example: *Dirk Andres* (n 99), para 94

[239] Report from the Commission, *XXXIst Report on Competition Policy 2001* (SEC/2002/0462), 113; Authorisation of 22 of September 2001 for State Aid pursuant to Articles 87 and 88 of the EC Treaty – Cases where the Commission raises no objections [2001] OJ C 268/5. See also: Commission Decision of 13 November 2001 C(2001)3455fin – State Aid N674/2001. See in this context: Authorisation for State Aid pursuant to Articles 87 and 88 of the EC Treaty – Cases where the Commission raises no objections [2002] OJ C 30/14, 15 in reference to Aid No: N674/2001.

the fact that only a limited number of undertakings out of the potential pool of beneficiaries of a (general) measure opted to take the steps necessary to obtain the advantage cannot be sufficient to be render the measure selective.[240] This principle has been consistently reiterated in fiscal cases.[241] In *Germany v Commission* the ECJ held that a measure conferring an advantage based on a transactional condition was a "general measure applicable without distinction to all economically active persons", and thus could not be classed as aid,[242] at least in this context.[243]

The openness or general satisfiability of the conditions attached to the aid is important. A measure whose conditions make it realistically applicable only to a certain sector, will not be treated as a measure of general application.[244] The same applies to measures applicable only to a certain category of undertakings.[245] For example, in *Belgium v Commission*, a case on which the ECJ relied in its *World Duty Free* judgment, a seemingly general measure was granting an advantage that could conceivably only benefit undertakings in the bovine sector by subsiding Bovine Spongiform Encephalopathy (BSE) testing.[246] As a result, it was not an actual general measure, but a sectoral one. Similarly, in *Air Liquide* the condition for the award of the advantage was so specialised in terms of the activities it applied to, that it could not deemed to be general.[247] Additionally, the degree of latitude afforded to the national authorities when awarding the advantage can jeopardise the generality of an otherwise general measure. If the national authorities enjoy a wide degree of discretion, a measure that on its face may be general may be deemed selective.[248] On the contrary, when this discretion is limited and regulated by law, the measure in question will be deemed to be general.[249] The *World Duty Free* judgment arguably turns this on its head, by essentially saying that an open, seemingly general, measure has a degree of selectivity embedded in it, even though there was no discretion on behalf of national authorities.

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[240] *MOL Magyar* (n 174), para 91
[241] *Gibraltar* (n 20), para 73; *P Oy* (n 115), para 18; *Concello de Ferrol* (n 10), para 23
[242] Case C-156/98 *Germany v Commission* ECLI:EU:C:2000:467, para 22
[243] The measure was found to be aid, but this finding was based on the geographically limited scope of the measure, rather than the measure's material scope. See: *Germany v Commission* (n 242), para 23
[244] Case C-169/84 *Société CdF Chimie azote et fertilisants SA and Société chimique de la Grande Paroisse SA v Commission* ECLI:EU:C:1990:301, paras 22-23; Case 203/82 *Commission v Italy* ECLI:EU:C:1983:218, para 4; Case 126/01 *Ministère de l'Économie, des Finances et de l'Industrie v GEMO SA* ECLI:EU:C:2003:622, para 38
[245] *Spain v Commission* (n 10), para 50; Joined cases C-393/04 and C-41/05 *Air Liquide Industries Belgium SA v Ville de Seraing and Province de Liège* ECLI:EU:C:2006:403, paras 31-32
[246] Case C-270/15 P *Belgium v Commission* ECLI:EU:C:2016:489, paras 50-52
[247] *Air Liquide* (n 245), paras 31-32
[248] *P Oy* (n 115), para 25; Case C-256/97 *Déménagements-Manutention Transport SA (DMT)* ECLI:EU:C:1999:332, para 27; Case C-200/97 *Ecotrade v Altiforni e Ferriere di Servola* ECLI:EU:C:1998:579, para 40; *France v Commission* (n 10), para 24
[249] *MOL Magyar* (n 174), paras 64-65

It is possible to infer from the case law that in cases where the difference in treatment results from choices made by undertakings, provided that all options were available to all undertakings, a finding of State aid cannot be supported.[250] The case law relied on by the ECJ in *World Duty Free* in this part of its analysis concerned measures that were either purely or primarily sectoral, despite the fact that some non-sectoral undertakings could also benefit from them.[251] It is true, as Traversa notes, that general measures can be applied selectively,[252] which, could arguably be the case here, as small companies would probably be less likely to invest than larger ones,[253] but such an assessment is not present in the ECJ's analysis. Instead, what this analysis betrays is unwarranted formalism. Instead of examining the generality of the application of the measure, which would be more in line with the effects-based approach, the ECJ focused on its form. It was essentially enough to show that the measure was a derogation from the reference framework,[254] regardless of the actual general applicability of the measure based on its conditions and effects. Specifically, the ECJ stated that the condition of selectivity is satisfied when the Commission "is able to demonstrate that that measure is a derogation from the ordinary or 'normal' tax system applicable",[255] with no further discussion.

There are examples of the logic permeating the *World Duty Free* judgment being applied to other cases, without the (warranted) controversy that followed this particular judgment.[256] In *Commission v Italy*, the General Court held that simply because a measure (in that case a reduction in excise duty paid for diesel) was open to all undertakings that chose to operate greenhouses, that did not mean it was not selective, as the agricultural producers that did operate greenhouses were in a comparable legal and factual situation with those that did not.[257] The same conclusion was reached in *Fineco Asset Management*, where the advantages accruing from specialised investment vehicles were conditional on a specific legal form.[258] The same principle can also be found in *Diputación Foral de Álava*, where a tax credit available to any undertaking investing more than 2.5 billion pesetas in

[250] Case C-390/98 *H.J. Banks & Co. Ltd v The Coal Authority and Secretary of State for Trade and Industry* ECLI:EU:C:2001:456, paras 48-50, 63
[251] *Italy v Commission* (n 179), paras 95-99; *Unicredito* (n 179), paras 45-50
[252] Traversa (n 85), 525
[253] Péter Staviczky, '*De facto* Selectivity in the Light of the Recent Case Law of the General Court' (2015) 14 European State Aid Law Quarterly 332, 337
[254] *World Duty Free* (n 28), paras 67-68
[255] *Ibidem* para 67
[256] See, for example: Jacques Derenne, 'Commission v World Duty Free Group a.o.: Selectivity in (Fiscal) State Aid, quo vadis Curia?' (2017) 8 Journal of European Competition Law & Practice 311; Phedon Nicolaides, 'Excessive Widening of the Concept of Selectivity' (2017) 16 European State Aid Law Quarterly 62; Phedon Nicolaides, 'The Case of the Spanish Tax Lease System' (2018) 17 European State Aid Law Quarterly 412; Massimo Merola, 'The Rebus of Selectivity in Fiscal Aid: A Nonconformist View on and Beyond Case Law' (2016) 39 World Competition 533
[257] Case T-379/09 *Commission v Italy* ECLI:EU:T:2012:422, paras 41-48
[258] Case T-445/05 *Associazione italiana del risparmio gestito and Fineco Asset Management v Commission* ECLI:EU:T:2009:50, para 152

the region "in fixed assets", differentiated between the companies that could do so, and those that did not have the money for it.[259] In all of those cases however, the contested measures created a differentiation *ex ante*; it was clear from the outset that only a number of undertakings could conceivably satisfy them, based on their inherent characteristics, as opposed to all undertakings that would be in a comparable situation. This arguably sets those judgments apart from *World Duty Free* and means that this particular judgment represents a significant evolution of the case law.

The *World Duty Free* formulation can practically give rise to a very wide reading of the second step of the criterion of selectivity. This is not helped by the fact that, as seen above, the first step is also quite wide, and open to interpretation. Equally, the objectives under which the comparability analysis is to be undertaken have also been widened. Of course, as academics and commentators have pointed out, an extensively broad reading of the first two steps of the test can lead to a situation where every deviation from the reference framework is deemed to be selective, and therefore, *prima facie*, *contra legem*.[260] As AG Geelhoed pointed out in *GIL Insurance*, a broad interpretation of selectivity "would be to extend the substantive scope of the prohibition on State aid far beyond the limits contemplated by the framers of the Treaty".[261] The role of selectivity as a concept is arguably undermined by the *World Duty Free* logic. Maintaining a meaningful selectivity criterion, especially in relation to the distinction between general measures and selective ones is essential to ensure that Article 107(1) does not become a vehicle for tax harmonisation, but instead maintains its objective of prohibiting distortive aid.[262]

Based on the Spanish Goodwill saga, it is argued that this judgment misapplied the law on general measures. It introduced an element of "behavioural" selectivity, where the factor determining whether there has been a differentiation of treatment between recipients and comparable non-recipients is based solely on the behaviour of those two groups; the two groups are defined based on their behaviour. The transformation of the law on general measures is of particular interest when placed in the context of this behavioural selectivity. The effects of this extensive widening of the second step of the selectivity analysis signalled with this

[259] *Diputación Foral de Álava* (n 221), para 162-166

[260] Miro Prek and Silvère Lefèvre, 'The Requirement of Selectivity in the Recent Case-law of the Court of Justice' (2012) 11 European State Aid Law Quarterly 335, 336; Micheau 'Legal Assessment and Alternative Approaches' (n 16), 323; Quigley (n 69), 112; Luja, '(Re)shaping Fiscal State Aid' (n 58), 120

[261] Case C-308/01 *GIL Insurance Ltd and Others v Commissioners of Customs & Excise* Opinion of AG Geelhoed ECLI:EU:C:2003:481, para 74

[262] Peters (n 234), 10

judgment cannot be foretold, but it arguably looks like the scope of fiscal aid, where the remaining four conditions exist around selectivity, has been blown wide open.

e. Conclusion

This section as a whole has looked at the comparability analysis which forms the base of the second step of the selectivity test. First of all, this analysis needs to be undertaken in light of the objectives of the system or the measure; the case law is unclear on this issue, demonstrating how uncertainties from the first step of the analysis can spill over into the second. This is especially true if the objectives deemed relevant are those of the reference framework. Secondly, the actual element of comparability also has free-flowing limits, as those are defined by the first part of the analysis of the second step. It is submitted that the comparability analysis, as it emerges from the case law, is limited by one crucial factor, namely the reference framework, as only those undertakings which are subject to the same legal framework can be said to be actually comparable.[263] It is also important to note that the comparability analysis needs to take into account a wide range of elements, as shown in *Paint Graphos* or *ANGED*, in order to be substantive and avoid becoming a mere box-ticking exercise. All this points to the malleable width of the second step of the analysis, which seems to have been extended further by the Spanish Goodwill saga. Thus, this section has shown the influence the first step can have on the second, and how the combination of the two can result in an exceedingly wide notion of fiscal selectivity.

IV. Step Three

So far, this Chapter has discussed the two first steps, which establish whether a measure is *prima facie* selective. As has been shown thus far, those two initial steps are subject to a wide, and arguably widening, interpretation, meaning that *prima facie* selectivity is increasingly easy to establish. As such, it is now necessary to examine the third step, and the potential justification of a selective measure.

The third, and final, step of the selectivity test deals with the justification of the contested, *prima facie*, selective measure. It must be determined whether the *prima facie* selectivity of the measure can be justified on the basis of the logic of the system. This notion of justification was introduced by the ECJ in the form of an *obiter dictum* in *Italy v Commission*.[264] The principle of justification has been reaffirmed several times, and has repeatedly found expression in the CJEU's jurisprudence.[265] It is worth noting that Member States bear the burden of proof; it is for them to

[263] See for example: *Hauptzollamt Osnabrück* (n 149), para 79
[264] *Italy v Commission* (n 8), para 33
[265] See for example : *British Aggregates* (n 10), para 76; *Unicredito* (n 179), para 51; Case C-53/00 *Ferring SA v Agence centrale des organismes de sécurité sociale* ECLI:EU:C:2001:627, para 17; *Belgium v Commission* (n 10), para 33; Case C-353/95 P *Tiercé Ladbroke SA v Commission* ECLI:EU:C:1997:596; Case T-211/05 *Italy v Commission* ECLI:EU:T:2009:304, para 117

demonstrate that the measure in question can be reasonably justified as intrinsic to the nature or structure of the tax frame of reference, or that it results from the guiding principles of the tax system.[266] As such, in *Concello de Ferrol*, an attempted justification on the grounds of national defence was unsuccessful, as it was not related to the objectives of property tax.[267] In *Netherlands Maritime* it was held that a "rational justification", understood as the "economic rationale" of a given measure, if it relates to the functioning and effectiveness of the tax system, can be allowed as a part of the justification analysis.[268]

In *Paint Graphos*, a requirement of proportionality was introduced into the third step of selectivity,[269] as well as requirement for that proportional nature to be monitored,[270] presumably to ensure the continued proportionality of the measure.[271] Additionally, *Paint Graphos* clarified that only intrinsic considerations can lead to justification.[272] The contested measure thus needs to be consistent with and proportional to those intrinsic aims.[273] As Micheau observes, proportionality in the context of State aid is used exclusively in the justification phase of the analysis, and thus cannot be applied to assess the derogation.[274] Even with this limited scope, the requirement for proportionality has not been (often) reiterated, as Buendia Sierra points out.[275] Nonetheless, proportionality is occasionally mentioned as part of the justification process.[276]

Given that only intrinsic considerations can be successful, it is important to illustrate the difference between intrinsic and extrinsic considerations as they apply to justifications. There is no closed list of accepted intrinsic objectives, but rather an open one developed through the jurisprudence of the CJEU. Even with objectives that have in the past been found to be intrinsic to the logic of the system, such as

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[266] *P Oy* (n 115), para 22; Case C-452/10 P *BNP Paribas v Commission* ECLI:EU:C:2012:366, para 121; *Gibraltar* (n 20), para 146; *Paint Graphos* (n 17), para 65; *NOx* (n 34), para 77; *Forum 187* (n 25), paras 124-126; *British Aggregates* (n 30), para 84; *Portugal v Commission* (n 21), para 81-84; Joined Cases T-427/04 and T-17/05 *France v Commission* ECLI:EU:T:2009:474, para 232; *GFKL* (n 92), para 153

[267] *Concello de Ferrol* (n 10), para 44

[268] *Netherlands Maritime* (n 219), para 86; *Netherlands Maritime* (n 224), para 109. See also: 2016 Notice (n 11), para 23. See also: Conor Quigley, *European State Aid Law and Policy* (3rd edn, Hart Publishing 2015), 119

[269] *Paint Graphos* (n 17), para 75

[270] *Ibidem*, para 74

[271] Micheau 'Legal Assessment and Alternative Approaches' (n 16), 332

[272] *Paint Graphos* (n 17), para 69

[273] *Ibidem*, para 73

[274] Micheau 'Legal Assessment and Alternative Approaches' (n 16), 343

[275] Buendia Sierra (n 18), 91

[276] *GFKL* (n 92), para 154

social security,[277] environmental protection,[278] or equal treatment, the Courts still need to examine the details of each case.[279] For example, in *Adria-Wien*, the Court found that the environmental objectives underlying the measure could not justify the difference in treatment entailed in the measure.[280] Protectionist objectives, such as improving or safeguarding competitiveness in a given sector, cannot be accepted as intrinsic to the logic of the tax system, as they relate to economic policy, rather than the nature or logic of the tax system, and therefore are extrinsic to the system.[281] The case law therefore shows that even recognised intrinsic considerations cannot always justify a selective measure, and the actual justification of such a measure will depend on the circumstances of the case. This is rational, following from the fact that justifications need to be examined in the context of the logic of a given system, which changes with each given system examined.

Certain tax-specific objectives have been found to be intrinsic to the logic of the system. It is important to stress that those look at the logic of the tax system, and not at the logic or the objectives of the executive passing the relevant tax legislation.[282] A measure which is necessarily part of the "inseparable whole" of the tax system is in line with its logic, and therefore justifiable.[283] Therefore, the effective functioning of a national tax system is an important part of the justification analysis, which can be taken to mean that ensuring that effectiveness would be an acceptable objective justification.[284] Avoiding double taxation has been found to be a valid basis for justification,[285] as well as preventing fiscal abuse.[286] Taxable capacity, or more commonly the ability to pay, forms part of the basis of the entire tax system, and as such can be used as a justification.[287] The progressivity of tax, and the redistribution of generated revenue, in the context of income taxation have also been accepted as justifications.[288] However, similar redistributive considerations

[277] Case C-355/00 *Freskot AE v Elliniko Dimosio* ECLI:EU:C:2003:298, para 86; *Belgium v Commission* (n 10), paras 32-34; *Belgium v Commission* Opinion of AG La Pergola (n 235), paras 8-10

[278] Joined Case C-128/03 and C-129/03 *AEM SpA and AEM Torino SpA v Autorità per l'energia elettrica e per il gas* ECLI:EU:C:2005:224, para 43. Compare with: *British Aggregates* (n 10), para 92; *NOx* (n 34), para 75

[279] *British Aggregates* (n 10), paras, 86, 92, 110-11, 142; *NOx* (n 34), paras 75-78 Case C-368/04 *Transalpine Ölleitung in Österreich GmbH and Others v Finanzlandesdirektion für Tirol and Others* ECLI:EU:C:2006:644, para 18

[280] *Adria-Wien* (n 15), paras 49-54

[281] *Italy v Commission* (n 179), para 101; *Italy v Commission* (n 257), para 51

[282] *Cassa di Risparmio di Firenze* (n 179), para 137

[283] *GIL Insurance* (n 126), para 74

[284] *Portugal v Commission* (n 21), paras 82-83

[285] *Paint Graphos* (n 17), para 71; *A-Brauerei* (n 122), para 52

[286] *A-Brauerei* (n 122), para 51

[287] Case C-6/97 *Italy v Commission* Opinion of AG Colomer ECLI:EU:C:1998:416, para 27 and footnote 18

[288] Joined cases T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava and Others v Commission* ECLI:EU:T:2002:59, para 166; *Diputación Foral de Álava* (n 221), para 179

were not sufficient to justify a Portuguese measure, as the scope of the measure was too wide.[289] Finally, the 2016 Notice and the 1998 Notice also set out some tax-specific intrinsic justifications.[290] However, even an accepted fiscal objective does not guarantee that a measure will be justified, as the measure's proportionality is also relevant,[291] as are the specifics of a given case and a given system.

In effect, considering the importance the case law on potential justifications places on the system's consistency, it is possible, given the Courts' and the Commission's recognition of specific systemically inherent fiscal justifications, to argue that an element of fiscal coherence is present. Systemic consistency is generally an important element of fiscal selectivity,[292] meaning that such a consideration could be present in the final step of the analysis. It has been suggested that fiscal State aid, in order to maintain its effect-based outlook in relation to taxation, needs to draw from tax law principles,[293] and this approach follows from that observation, especially given that arguably the logic of the inherent tax-specific justifications is indeed at least conceptually linked to this concept of systemic cohesion.[294] Given that tax-specific justifications have been accepted, and bearing in mind the requirement of proportionality present in this step of the selectivity test, it is submitted that fiscal coherence is also present, if unnamed.[295] Fiscal coherence ensures that the measures to be justified flow from the logic of the system and are proportional to that logic. A fiscal coherence outlook in this step would ensure a degree of systemic symmetry, relating to the symmetrical nature of certain advantages and certain disadvantages, or the suspension of anti-abuse rules such as loss forfeiture in instances where abuse cannot take place. The excessive widening of the first two steps of the selectivity analysis will arguably increase the importance of the third step of the analysis.[296] In order to maintain a functional distinction between selective effects and those flowing from the application of an internally consistent, coherent system, and in the interest of maintaining the scope of the fiscal aid prohibition, the notion of fiscal coherence should be employed more overtly in the justification step of the test. After all, the effectiveness of the system is closely linked to its internal consistency and

[289] *Portugal v Commission* (n 21), para 82
[290] 2016 Notice (n 11), para 139; 1998 Notice (n 14), para 23
[291] See for example the Court's analysis as to the width of the contested measure in light of the objectives pursued in *Portugal v Commission* (n 21), paras 82-83
[292] Cisotta (n 2), 133
[293] Thomas Jaeger, 'Taking Tax Law Seriously: The Opinion of AG Mazak in EDF' (2012) 11 European State Aid Law Quarterly 1, 3
[294] Peter J Wattel, 'Forum: Interaction of State Aid, Free Movement, Policy Competition and Abuse Control in Direct Tax Matters' [2013] World Tax Journal 128, 134
[295] See also: Biondi (n 134), 1737; Prek and Lefèvre (n 260), 341
[296] Wattel, 'Forum' (n 294), p 134

coherence, or "economic rationale",[297] meaning that it would not be alien to the case law. Accepting such a fiscal coherence justification would be another step, alongside the emergence of the holistic approach for the determination of the reference framework, towards the adoption of a more fiscal outlook in fiscal aid cases, which recognises the inherent complexities and peculiarities of taxation.

This section has discussed the third step of the selectivity analysis. In this step, the burden of proof is reversed, which is particularly relevant in the context of the width of the first two steps.[298] Measures whose existence can be proven to be necessary for the effective functioning of the tax system, and which have, in this context, an economic rationale, will in principle be deemed to be justified. However, a justification will need to be intrinsic to the system and adhere to the principle of proportionality in order to be able to be successful. In this context, tax-specific justifications have been recognised. In practical terms, therefore there is little to no systematisation, which arguably follows from the inconsistencies present in the first two steps, which to an extent inform the material content of the justification analysis. The fact that tax principles have been used as bases for justification, as illustrated above, could prove to be very interesting in the future, if the regulatory technique of Member States came to stretch the third step of the analysis as well, in response perhaps to the widening of the first two steps. In this context, the notion of fiscal coherence could prove very helpful, both by protecting Member States from an ever-expanding notion of aid, and by ensuring that regulatory technique cannot be used to create a justification out of thin air.

V. Conclusion

This Chapter has looked at the notion of fiscal selectivity, by examining each of the three limbs of the well-established test.[299] First of all, throughout this analysis, it is apparent that the three-step approach and its formulation are alive and well, despite "discrimination" becoming more relevant in the context of selectivity,[300] and despite the notion itself being widened. As such, the core of the fiscal selectivity analysis still requires the identification of a reference framework, based on which, via derogation or design, some undertakings are favoured when compared to others which are in a similar legal and factual situation in light of the objectives of the measure, the system, or the reference framework. Such a difference in treatment establishes *prima facie* selectivity, which can be reversed, if the granting State can show that the contested measure or scheme results from the logic of the system or

[297] *Netherlands Maritime* (n 219), para 86; *Netherlands Maritime* (n 224), para 109. See also: 2016 Notice (n 11), para 23
[298] Merola (n 256), 555; Giraud and Petit (n 213), 315
[299] 1998 Notice (n 14), para 16; 2016 Notice (n 11), para 128; *Adria-Wien* (n 15), para 41
[300] W. Schön, 'Tax Legislation' (n 19), 12, 16-17; Peter J Wattel, 'Comparing Criteria: State Aid, Free Movement, Harmful Tax Competition and Market Distorting Disparities' in I Richelle, W Schön, E Traversa (eds) *State Aid Law and Business Taxation* (Springer 2016), 61-62, 64

is justified by it. It is clear that the first two steps have been widened considerably, while entire general systems, as well as general measures, can be deemed selective by adjudging their effects under this exceedingly wide construct. It is also possible to argue that there are elements of the selectivity analysis that struggle with fiscal cases, or at the very least with fiscal elements of cases.

In brief, the application of the selectivity criterion to fiscal cases is obviously messy, and the case law does not make things much clearer. The case law is far from settled, in fact it is fragmented, as Merola points out.[301] A particular problem, observed by commentators, is that the ECJ has the tendency to overrule General Court judgments that attempt to narrow the focus of the concept of selectivity,[302] and arguably ends up expanding the concept of selectivity a bit more with every repudiation of the General Court's approaches. The rigidity, and on occasion the formalism, of the ECJ's approach forces the General Court to apply an unsatisfactory legal regime.[303] Thus, we end up with a vague regime,[304] based on unclear and occasionally conflicting analytical approaches, as evidenced by the discrepancies in the case law. There is no agreement as to how wide the "general system" is, the "comparable legal and factual situation" is equally ambiguous, with an increasingly wider reading of that step becoming the norm, while the final step depends on the individual circumstances of each case. In fact, it appears that, since the established law allows for some latitude, all three steps depend, to an increasing extent, on the merits of each individual case,[305] with subjective approaches becoming more common,[306] arguably eroding the objective nature of the concept of aid. At the same time, the three-step formulation of the test is universal, and not challenged.

Based on the case law, the Commission's decisional practice, and the soft law applicable to State aids, it is possible to draw the conclusion that the concept of selectivity, especially when it comes to fiscal cases is becoming increasingly wide;[307] to the point where only a few measures can escape its reach.[308] Equally, Lang observes that the reading of selectivity offered by the ECJ in *Gibraltar* is very wide, to the extent that it can theoretically allow the Commission to pursue its own policy

[301] Merola (n 256), 553
[302] Begona Perez-Bernabeu, 'Refining the Derogation Test on Material Tax Selectivity: The Equality Test' (2017) 16 European State Aid Law Quarterly 582, 597; Merola (n 256), 553; Arhold, Kreuschitz, Säcker, Soltesz, Shuette, Schwab (n 237), paras 403-408, Biondi (n 134), 1730-1731
[303] Merola (n 256), 539
[304] Perez-Bernabeu (n 302), 596
[305] Jaeger, 'Tax Measures' (236), para 53
[306] Hugo López López, 'General Thoughts on Selectivity and Consequences of a Broad Concept of State Aid in Tax Matters' (2010) 9 European State Aid Law Quarterly 807, 812
[307] Jaeger, 'Tax Measures' (n 236), para 42
[308] Bartosch, 'A Rule of Reason in European State Aid Law' (n 141), 732. See also Andreas Bartosch, 'The concept of selectivity' in E Szyszczak (ed) *Research Handbook on European State Aid Law* (Edward Elgar Publishing 2011), 189-190

aims under the auspices of the State aid prohibition.[309] The same view is echoed by Romariz,[310] and Perez-Bernabeu,[311] while Micheau also seems to concur.[312] It has also been suggested that the concept of selectivity risks becoming as wide as the notoriously broad criteria of distortion of competition and effect on trade.[313] Given however that, as the previous sentence attests, some of the conditions of fiscal aid are already excessively wide,[314] such a broad reading of fiscal selectivity can be troublesome.

This relates to the importance of selectivity, as it is the crux of State aid law. This is because it is relevant to all cases, its inherent logic is linked with the notion of aid itself, and its application cannot be frustrated by regulatory technique.[315] AG Kokott, in her Opinion in *Finanzamt Linz*, observed that selectivity is the decisive criterion of the existence of (fiscal) aid.[316] Similarly, AG Geelhoed in his Opinion in *GIL Insurance*, explained that taking a wide view of selectivity would be tantamount to extending "the substantive scope of the prohibition on State aid".[317] In this context, he argued that such expansive readings of selectivity may reduce the Member States' ability to use taxation as a policy instrument, or even remove some Treaty-assigned competences from them.[318] Nicolaides makes a similar argument, based on the fact that tax systems, by design, will tend to include exceptions of general application, due to taxation's inherent role as a multifaceted policy instrument.[319]

To illustrate this point, let us consider the example of the Spanish Goodwill saga. On the one hand, the more famous line of cases dealt with reliefs for undertakings acquiring shares in EU-based companies, which were found to be *contra legem*.[320] On the other hand, a similar measure providing the same reliefs for extra-EU investments was struck down by the General Court in *Sigma Alimentos*.[321] If Spain had attempted to introduce a similar relief measure for acquisitions in domestic companies, the judgment of the ECJ in *Finanzamt Linz*, where the Court dealt with an Austrian Goodwill scheme, strongly suggests that such a measure

[309] Lang, 'A "Methodological Revolution"?' (n 46), 806, 812
[310] Romariz (n 48), 45
[311] Perez-Bernabeu (n 302), 593
[312] Claire Micheau, 'Tax Selectivity in State Aid Review: A Debatable Case Practice' (2008) 17 EC Tax Review 276, 282
[313] Bartosch, 'A Rule of Reason in European State Aid Law' (n 141), 752. See also: *Spain v Commission* Opinion of AG Jacobs (n 6), para 33
[314] This will be further evidenced in the following Chapters of Part I.
[315] *Enirisorse* Opinion of AG Maduro (n 3), paras 47-50
[316] *Finanzamt Linz* Opinion of AG Kokott (n 209), para 114
[317] *GIL Insurance* Opinion of AG Geelhoed (n 261), para 74
[318] *Ibidem*, para 76. See also: *Finanzamt Linz* Opinion of AG Kokott (n 209), para 113; Jaeger, 'Tax Measures' (n 236), para 45
[319] Nicolaides, 'The Case of the Spanish Tax Lease System' (n 256), 417
[320] *World Duty Free* (n 28); *Santander* (n 165); *World Duty Free* (n 165)
[321] *Sigma Alimentos* (n 35)

would also be legally problematic, from the perspective of the fundamental freedoms.[322] Thus, it appears that only a replacement of the general system of taxation could escape fiscal State aid control, while any minor tweak would invite the Commission's and the Courts' scrutiny, arguably limiting or at the very least making harder the exercise of the Member States' fiscal competences. AG Maduro also expressed concerns that the excessive widening of State aid rules could mean that all economic policy decisions taken by Member States could fall within the scope of the State aid prohibition, especially if general measures are within the scope of selectivity.[323] Such an application of the rules, he maintained, would not be in line with the rationale of the concept of State aid and its role within EU competition law.[324]

In this light it is true that a plausible reading of the current understanding of fiscal selectivity is that any difference in the treatment of undertakings can lead to the conclusion that the contested measure creates a difference in treatment among undertakings in a comparable situation, making it *prima facie* selective.[325] This is especially true if the reference framework itself is excessively wide,[326] as the limits of the "comparable situation" are themselves expanded. In this context, it is clear that the scope of fiscal selectivity has been significantly widened. It is equally clear that a wide concept of selectivity can limit Member States' fiscal sovereignty. The case law discussed in this Chapter shows that even general measures are not necessarily outside of the scope of fiscal selectivity. This is particularly important, as selectivity performs an important function in relation to the scope of State aid and its internal rationale by delineating what is deemed to be preferential treatment.[327] The

[322] Case C-66/14 *Finanzamt Linz v Bundesfinanzgericht, Außenstelle Linz* ECLI:EU:C:2015:661, para 54. In general, one of the primary concerns of the internal market and the law guaranteeing its existence is the removal of nationality-based discrimination. Essentially, EU law requires that national tax legislation does not create directly or indirectly discriminatory obstacles to economic activity. This includes covert discrimination, which by the application of other criteria of differentiation has the same effects as overt or direct discrimination. Discrimination is defined in the case law as the application of different rules to comparable situations, or the application of the same rules to objectively different situations, and covers tax legislation which may deter, discourage, dissuade, or restrict the exercise of the fundamental freedoms, or place non-nationals at a disadvantage in the pursuit of economic activity. See: Case C-330/91 *The Queen v Inland Revenue Commissioners, ex parte Commerzbank AG* ECLI:EU:C:1993:303, paras 14-15, 19; Case C-311/97 *Royal Bank of Scotland plc v Elliniko Dimosio* ECLI:EU:C:1999:216, para 26; Case C-446/03 *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)* ECLI:EU:C:2005:763, para 31; Case C-345/05 *Commission v Portugal* ECLI:EU:C:2006:685, para 15; Case C-311/08 *Société de Gestion Industrielle (SGI) v Belgian State* ECLI:EU:C:2010:26, para 50; Case C-303/12 *Guido Imfeld and Nathalie Garcet v État belge* ECLI:EU:C:2013:822, paras 52-53; Case C-296/12 *Commission v Belgium* ECLI:EU:C:2014:24, para 31; Case C-385/12 *Hervis Sport- és Divatkereskedelmi Kft. v Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága* ECLI:EU:C:2014:47, para 30; Case C-48/13 *Nordea Bank Danmark A/S v Skatteministeriet* ECLI:EU:C:2014:2087, para 22

[323] *Enirisorse* Opinion of AG Maduro (n 3), para 45

[324] *Ibidem*, para 46

[325] Prek and Lefèvre (n 260), 341

[326] Micheau 'Legal Assessment and Alternative Approaches' (n 16), 337

[327] *Enirisorse* Opinion of AG Maduro (n 3), para 49

widening of the notion of selectivity, and its application in the case law, in turn means that it can no longer perform the essential task of differentiating between preferential and general measures.[328] Additionally, the widening of individual components of the selectivity test like the reference framework can impact the assessment of the existence of an advantage, as to an extent the "normal" market conditions in which the latter is to analysed are based on that framework. In effect, the reference framework to an extent determines the rule of which the "normal" application is to be assessed.

Thus, it is clear from the outset that the scope of fiscal selectivity influences the scope of fiscal aid in general, and can influence the application of other criteria of aid. However, the following Chapters of Part I will demonstrate that selectivity is far more important in fiscal cases, as it defines the scope of fiscal State aid itself, due to the limitations or internal logic of the remaining criteria in relation to taxation. Thus, a wide concept of fiscal selectivity translates into a wide scope for the fiscal State aid prohibition in general, which becomes (even more) problematic in the context of the limitations of the compatibility regime discussed in the previous Chapter. In brief therefore, the excessive widening of the notion of fiscal selectivity analysed in this Chapter represents at the same time an excessive widening of the scope of aid itself. This is particularly troublesome, as the system of fiscal aid itself is becoming overreaching, potentially significantly limiting Member States' ability to conduct policy through their tax system – as all policy Decisions effected through the fiscal regime can fall within the scope of selectivity.[329] Equally, due to the central role of selectivity and the fact that the remaining criteria do not provide normative limitations to the scope of fiscal aid, there is no obvious obstacle to the ceaseless expansion of the scope of selectivity and therefore fiscal aid. As the components of the selectivity test change and become wider, it is important to remember AG Jääskinen's position in Gibraltar, and try steering clear of ad hocery.[330]

[328] *Sloman Neptun* Opinion of AG Darmon (n 232), para 47
[329] *Enirisorse* Opinion of AG Maduro (n 3), para 45
[330] *Gibraltar* Opinion of AG Jääskinen (n 61), para 134

The Notion of Fiscal Advantage

I. Introduction

The notion of advantage is, in practical terms, perhaps the most straightforward of the five conditions of State aid. It effectively refers to the benefit or favourable treatment reserved to the beneficiaries of the aid. Arguably, the presence of an advantage is the starting point of the State aid analysis.[1] The other four conditions in effect look at the characteristics of that advantage – its selectivity, its distortive potential, and whether it is granted via State resources. Despite this, the advantage criterion rarely receives a lot of attention in fiscal State aid cases, despite its relevance in general State aid.[2] Before discussing the specific application of the notion of advantage in fiscal cases, it is necessary to make some preliminary remarks. First of all, it should be noted that, as is the case with selectivity, the precise form of the measure is irrelevant.[3] What is of importance, and what is examined, is the effect of the measure.[4] As a result, a measure cannot fall outside the scope of Article 107(1) TFEU solely on the merits of its objectives, while on the other hand, a non-advantageous or commercially sound measure that also promotes a political aim, will not be found to be aid solely because of said political aim.

This Chapter will first look at the general concept of advantage, and its application and relationship with fiscal measures. It will then briefly discuss the Market Economy Operator Principle (MEOP), looking at its importance within the concept of advantage while also examining the characteristics of the hypothetical comparable market economy operator. Following this, an analysis of the applicability of the MEOP to fiscal cases, and to cases where the exercise of State authority forms an integral part of the measure will be undertaken, leading to an examination of its application to fiscal cases. Finally, this Chapter will address the allocation of the burden of proof, and the requisite standard of proof inherent in the analysis of the MEOP, and the notion of advantage in general. Throughout, this Chapter will aim to demonstrate the differences between the notion of advantage in fiscal cases as opposed to non-fiscal cases, the issues that the MEOP, the main analytical tool of this notion, faces in relation to fiscal cases, and the importance of properly establishing the existence of an advantage, fiscal or otherwise.

[1] See for example: Case C-15/14 P *Commission v MOL Magyar Olaj- és Gázipari Nyrt* Opinion of AG Wahl ECLI:EU:C:2015:32, para 47. See also: Peter J Wattel, 'Comparing Criteria: State Aid, Free Movement, Harmful Tax Competition and Market Distorting Disparities' in I Richelle, W Schön, E Traversa (eds) *State Aid Law and Business Taxation* (Springer 2016), 61-62

[2] See for example: Case 323/82 *Intermills v Commission* ECLI:EU:C:1984:345, paras 29-31

[3] Case C-280/00, *Altmark Trans and Regierungspräsidium Magdeburg* ECLI:EU:C:2003:415, para 84

[4] Case 173/73 *Italy v Commission* ECLI:EU:C:1974:71, para 13

II. Concept of Advantage

The notion of advantage is, in fiscal cases, closely linked to the notion of selectivity, since the existence of an advantage can only be assessed upon a comparison with the frame of reference. In general, an "advantage", for the purposes of Article 107(1), means "any economic benefit which an undertaking would not have obtained under normal market conditions".[5] The frame of reference in effect defines those "normal" market conditions. More broadly, an advantage is any measure that mitigates the charges usually applicable to the budget of an undertaking,[6] as it has the same effect as a direct subsidy.[7] This serves to stress that the effects of the measure in question are the focus of the analysis of the existence of an advantage,[8] regardless of the measure's aims or causes, and with no regard for the regulatory technique employed.[9]

In relation to tax, the "normal" market conditions, or the mitigation of charges, will have to be assessed based on the reference framework, as it represents the normal conditions for other comparable undertakings.[10] As a result, a fiscal advantage can in many cases be presumed by virtue of selectivity being present.[11] For example, a tax exemption confers an economic advantage to the recipient undertaking, as it mitigates the charges that would, in normal market conditions, be borne by that undertaking.[12] However, the potentially beneficial application of normal rules does not confer an advantage.[13] This showcases the limits of the notion, and the importance of the "normal market conditions" or the "usually" applicable charges; the application of rules on, for example, bankruptcy or the repayment of charges irregularly collected is indeed in line with normal market conditions, and does not mitigate any charges usually applicable.[14] Jaeger

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[5] Case C-39/94 *SFEI and Others v La Poste and others* ECLI:EU:C:1999:116, para 60

[6] Case C-387/92 *Banco Exterior de España v Ayuntamiento de Valencia* ECLI:EU:C:1994:100, para 13; Case C-6/97 *Italy v Commission*, ECLI:EU:C:1999:251, para 15

[7] Case C-74/16 *Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe* ECLI:EU:C:2017:496, paras 65-66; Joined Cases C-399/10 P and C-401/10 P *Bouygues and Bouygues Télécom v Commission and Others and Commission v France and Others* EU:C:2013:175, para 101

[8] Case C-522/13 *Ministerio de Defensa and Navantia SA v Concello de Ferrol* ECLI:EU:C:2014:2262, para 21

[9] Case C-203/16 P *Dirk Andres (faillite Heitkamp BauHolding) v Commission* ECLI:EU:C:2018:505, para 91; Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar* ECLI:EU:C:2011:732, paras 87, 92-93

[10] Case C-501/00 *Spain v Commission* ECLI:EU:C:2004:438, para 115

[11] Case C-66/02 *Italy v Commission* ECLI:EU:C:2005:768, para 78; Joined cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* ECLI:EU:C:2006:403, para 30

[12] *Concello de Ferrol* (n 8), para 27-29

[13] Case C-200/97 *Ecotrade v Altiforni e Ferriere di Servola* ECLI:EU:C:1998:579, para 36; Case C-480/98 *Spain v Commission* ECLI:EU:C:2000:559, para 18; Case 61/79 *Amministrazione delle finanze dello Stato v Denkavit italiana* ECLI:EU:C:1980:100, para 31

[14] *Ibidem*

argues that this generally reductive reasoning makes the advantage analysis of fiscal cases devoid of substance.[15]

As AG Tizzano stated, a failure to levy tax is not necessarily tantamount to the granting of an advantage, but rather a "solution must be sought on a case by case basis, with regard being had to the particular circumstances of the case".[16] This is perfectly in line with the notion of advantage, as the normal market conditions element of it suggests. In this context, it is important to make the distinction between the advantage obtained, and the benefit which the recipients derived from said advantage,[17] as the recipient and the beneficiary of an advantage need not be the same.[18] Additionally, if there are two rates, a "normal" one and a higher one, those taxpayers who pay the lower one are not in fact receiving an advantage,[19] as an advantage is defined based on *normal* taxation. This additionally means that the undertakings paying the higher rate cannot rely on State aid to get out of their liabilities.[20] Furthermore, contrary to the formulation seen above that any mitigation of charges will be seen as an advantage, in certain cases dealing with structural disadvantages the CJEU has been willing to recognise that the mitigation of those specific charges, stemming from the disadvantage, does not constitute an advantage.[21] Based on the case law, it seems that for this line of thought to apply a "dual derogation" is necessary, which means that the disadvantage to be redressed needs to be itself a derogation.[22] This limits the scope of application of this atypical exemption.

Despite the similarities that may exist between the notions of advantage and selectivity as they apply to tax, and the tendency to get them mixed up, it is important that they remain separate, as they are two separate criteria, requiring two separate analyses. This is important for the soundness of the analysis involved in

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[15] Thomas Jaeger, 'Tax Measures' in F J Säcker and F Montag (eds) *European State Aid Law* (Beck Hart Nomos 2016), para 75

[16] Case C-53/00 *Ferring SA v Agence centrale des organismes de sécurité sociale* Opinion of AG Tizzano ECLI:EU:C:2001:253, para 39

[17] Joined Cases C-164/15 P and C-165/15 P *Commission v Aer Lingus and Ryanair* ECLI:EU:C:2016:990, paras 101, 115

[18] Case C-156/98 *Germany v Commission* ECLI:EU:C:2000:467, para 27; Case C-128/16 P *Commission v Spain and Others* ECLI:EU:C:2018:591, paras 45-46

[19] Case C-308/01 *GIL Insurance Ltd and Others v Commissioners of Customs & Excise* ECLI:EU:C:2004:252, para 76

[20] Joined cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04 *Nazairdis SAS, now Distribution Casino France SAS and Others v Caisse nationale de l'organisation autonome d'assurance vieillesse des travailleurs non salariés des professions industrielles et commerciales* ECLI:EU:C:2005:657, paras 43-44; *Air Liquide* (n 11), para 43

[21] Case C-237/04 *Enirisorse SpA v Sotacarbo SpA* ECLI:EU:C:2006:197, paras 47-49; Case T-157/01 *Danske Busvognmænd v Commission* ECLI:EU:T:2004:76, para 57

[22] Case C-211/15 P *Orange v Commission* ECLI:EU:C:2016:798, paras 25-26. See also: Adrien Giraud and Sylvain Petit, 'The French Pension Case: The Defence Based on Compensation of Structural Disadvantages Consigned to Oblivion' (2017) 16 European State Aid Law Quarterly 82

both criteria, and as a recognition that they perform different roles within the realm of fiscal State aid control. This position can be supported by *MOL Magyar*, where the ECJ clearly stated that "the requirement as to selectivity under Article 107(1) TFEU must be clearly distinguished from the concomitant detection of an economic advantage".[23] AG Wahl, whose Opinion the Court followed, went further, stating that the "requirement as to selectivity […] of the measure must be clearly distinguished from the detection of an economic advantage. In other words, once an advantage, understood in a broad sense, has been identified as arising directly or indirectly from a particular measure, it is then for the Commission to establish that that advantage is specifically directed at one or more undertakings".[24] Thus, the existence of an advantage is the starting point of the State aid analysis.[25] Only if an advantage is selective will it be deemed to confer State aid.

Maintaining the distinction between selectivity and advantage in this context becomes paramount, even if "normal" market conditions are defined based on the reference framework utilised in the selectivity analysis. The formal and strict distinction is important because if selectivity were to be merged with the notion of advantage, or replace it, it would then necessarily become the starting point of the State aid analysis. In turn, this would mean that the structure and rationale of the State aid prohibition would be altered, as it would no longer revolve around the existence of an advantage but would depend on differential treatment, very broadly construed as evidenced by the preceding Chapter. Focusing on the differential treatment as opposed to its actual effects (the benefit derived) would first of all depart from the effect-based approach, and would potentially make the existence of aid incumbent on regulatory technique. Despite this need for a clear distinction between the two notions, the Court has held that in cases of *individual* aid, the identification of an advantage would, in principle be sufficient to presume that said advantage is also selective.[26] However, this presumption is and should remain strictly limited to instances of individual grants of aid, meaning that the presumption would stem from the individual character of the aid as opposed to the existence of an advantage.[27] A general presumption that the existence of an advantage is sufficient for selectivity to be assumed would be problematic or even inappropriate in the examination of fiscal cases, as in fiscal cases selectivity is the decisive

[23] Case C-15/14 P *Commission v MOL Magyar Olaj- és Gázipari Nyrt* ECLI:EU:C:2015:362, para 59

[24] *MOL Magyar* Opinion of AG Wahl (n 1), para 47

[25] Wolfgang Schön, 'Tax Legislation and the Notion of Fiscal Aid: A Review of 5 Years of European Jurisprudence' in I Richelle, W Schön, E Traversa (eds) *State Aid Law and Business Taxation* (Springer 2016), 12, 16-17; Wattel (n 1), 61-64

[26] *MOL Magyar* (n 23), para 60

[27] See for example: Richard Lyal, 'Transfer Pricing Rules and State Aid' (2015) 38 Fordham International Law Journal 38 1017, 1042

criterion,[28] meaning that the scope of fiscal State aid would be substantially widened and become little more than an economic analysis.

In short, the notion of advantage is preoccupied with economic benefits not obtainable in normal market conditions, or the mitigation of normally applicable charges. This basic formulation is functional enough to catch advantages passed on from the recipient, and flexible enough to (potentially) allow for structural disadvantages to be redressed. Nonetheless, when it comes to purely fiscal measures, despite this relative flexibility, the application of the notion of advantage can be relatively basic, as any departure from normal conditions will usually lead to at least charges being mitigated. In this context, it becomes clear that in general the notions of fiscal (*prima facie*) selectivity and fiscal advantage seem to be subject to very similar test: finding the frame of reference/normal market conditions and then finding a derogation/deviation from it; even though the two notions and tests must be distinguished. Beyond this basic position, the notion of advantage encompasses a Market Economy Operator Principle (MEOP), which although of limited use to fiscal cases, needs to be discussed.

III. The Market Economy Operator Principle

The MEOP adds more substance to the analysis of the advantage criterion, by looking at the actual economic conditions in which it is granted. As the Commission mentions in its 2016 Notice on the Notion of Aid (the 2016 Notice), by virtue of Article 345 TFEU, State aid law is "neutral with regard to the system of property ownership".[29] This, as Arhold suggests, is the basis of the logic behind the MEOP.[30] In order for State aid rules to remain neutral, they have to allow public undertakings to operate in the market, while also being subject to the same rules as private undertakings. This balance is expressed through the MEOP, which in effect means that an advantage would be present if a Member State treats an undertaking in a different way than a private operator would.[31] Through several cases,[32] it was

[28] Case C-66/14 *Finanzamt Linz v Bundesfinanzgericht, Außenstelle Linz* Opinion of AG Kokott ECLI:EU:C:2015:242, paras 114-115; Liz Lovdahl Gormsen, 'EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga' (2016) 7 Journal of European Competition Law and Practice 369, 374-375; Kyle Richard, 'Are All Tax Rulings State Aid: Examining the European Commission's Recent State Aid Decisions' (2018) 18 Houston Business and Tax Law Journal 1, 17; Saturnina Moreno Gonzalez, 'State Aid and Tax Competition: Comments on the European Commission's Decisions on Transfer Pricing Rulings' (2016) 15 European State Aid Law Quarterly 556, 566

[29] Commission Notice on the notion of State Aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [2016] OJ C 262/01, para 73

[30] Christoph Arhold, Viktor Kreuschitz, Franz Jürgen Säcker, Ulrich Soltesz, Michael Shuette, Andreas Schwab, 'Article 107 TFEU' in F J Säcker and F Montag (eds) *European State Aid Law* (Beck Hart Nomos 2016), para 154

[31] Joined cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* Opinion of AG Jacobs ECLI:EU:C:1994:112, para 28

[32] Case C-305/89 *Italy v Commission* ECLI:EU:C:1991:142, paras 18-19; Case T-16/96 C*ityflyer Express v Commission* ECLI:EU:T:1998:78, para 51; Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech-Stahlwerke v Commission* ECLI:EU:T:1999:7, para 104

established that the actions of the State as an economic operator should be looked at comparatively with the actions of private economic operators in a situation as similar as possible, since the principle's objective is to scrutinise the actions of the State. In other words, it is necessary to assess whether, in a similar set of circumstances, a private economic actor operating in normal conditions could have been prompted to make the intervention in question.

The MEOP started being formulated as a concept related to State aid in the 1980s,[33] through a combination of soft law,[34] AG Opinions,[35] and a handful of cases.[36] The basic underlying principle of the MEOP is the necessity to properly distinguish between the capacity of the State in its entrepreneurial activities and its granting of subsidies for the purposes of the State aid control, which can achieved via a comparison to a hypothetical market operator.[37] As a result, the MEOP became part of the notion of advantage (and is thus focused on effects[38]), effectively providing a more case-sensitive benchmark. The MEOP allows an economically rational intervention which is in line with the hypothetical actions of a private operator to avoid being classified as aid, allowing the State to participate in the economy, without being able to play favourites or otherwise distort competition in the context of State aid law.

The MEOP has evolved and grown in sophistication. Even though it started as an "investor" principle, it has grown to encompass more types of economic activities. It still remains one unitary principle, with multiple iterations.[39] The typology of those iterations is not limited. In the Commission's 2016 Notice, the principle appears under the heading "Market Economy Operator Test", as it encompasses more and more scenarios, including a "private creditor test",[40] and a "private vendor test".[41] As Arhold suggests, the MEOP can take various forms,

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[33] Aindrias O' Caoimh and Wolf Sauter, 'Criterion of Advantage' in H Hofmann and C Micheau (eds), *State Aid Law of the European Union* (OUP 2016), 105-107

[34] Secretariat General, *Bulletin of the European Communities: No 9* (1984 Volume 17), 93-95

[35] Case C-323/82 *Intermills v Commission* Opinion of AG VerLoren van Themaat ECLI:EU:C:1984:260, 3847; Case 234/84 *Belgium v Commission* Opinion of AG Lenz ECLI:EU:C:1986:151, 2270; Case 40/85 *Belgium v Commission* Opinion of AG Lenz ECLI:EU:C:1986:152, 2328

[36] Case 234/84 *Belgium v Commission* ECLI:EU:C:1986:302, para 14; Case 40/85 *Belgium v Commission*, ECLI:EU:C:1986:305, para 13

[37] *Ibidem*, para 14; para 13, respectively; *Belgium v Commission* Opinion of AG Lenz (n 35), 2270-2271; *Belgium v Commission* Opinion of AG Lenz (n 35), 2328-2329

[38] Case C-56/93 *Belgium v Commission* ECLI:EU:C:1996:64, paras 78-79; Joined Cases C-214/12 P, C-215/12 P, C-223/12 P *Land Burgenland and Others v Commission* ECLI:EU:C:2013:682, paras 48-50; European Commission, *XXIXth Report on Competition Policy* (SEC(2000) 720 FINAL 1999), para 224

[39] Case C-256/97 *Déménagements-Manutention Transport SA (DMT)* Opinion of AG Jacobs ECLI:EU:C:1998:436, para 35. See also: Albert Sanchez Graells, 'Bringing the "Market Economy Agent" Principle to Full Power' (2012) 33 European Competition Law Review 35

[40] 2016 Notice (n 29), para 74

[41] *Ibidem*

beyond those in the 2016 Notice.[42] For example, the State can be compared to a "private lender",[43] a "private creditor",[44] a "private supplier/service provider",[45] a "private purchaser",[46] and a "private vendor".[47] Following the logic of the concept of advantage, any transaction that produces a result departing from normal market conditions, defined as the acts of a MEO, would fail to satisfy the MEOP, regardless of the specific nature of the transaction. However, if a State intervention is in line with the acts of a MEO, it will be deemed to have been carried out in normal market conditions, meaning that the advantage criterion will not be satisfied. The MEOP necessitates an actual comparison to establish whether a given measure conforms to market conditions, resulting in a multitude of possible iterations, but as stated above, its internal logic is unitary. In this context, and since the MEOP is an integral part of the notion of advantage,[48] it is worth briefly considering the characteristics of a market operator who is to be compared to the State.

Through the evolution of the concept, it emerges that the hypothetical operator is construed as being prudent and efficient, utilising the most appropriate means available.[49] The MEO has also been described as reasonable, stable, and ordinary,[50] and is generally recognised to be profit-motivated and not concerned with policy aims.[51] In this context, when the State acts as an investor, it is not bound to pursue the most lucrative investment, but it cannot forgo a clear profit-making opportunity.[52] Arguably, any profitable intervention, or profitable enough to entice a private operator, could thus satisfy the MEOP.[53] The operator should also be

[42] Arhold, Kreuschitz, Säcker, Soltesz, Shuette, Schwab (n 30), paras 168-229
[43] Case 40/85 *Belgium v Commission* (n 36), para 13
[44] Case C-342/96 *Spain v Commission* ECLI:EU:C:1999:210, para 46; Case C-73/11 P *Frucona Košice v Commission* ECLI:EU:C:2013:32, para 73
[45] Case C- 279/08 P *Commission v The Netherlands (NOx)* ECLI:EU:C:2011:551, para 86; Joined cases 67/85, 68/85 and 70/85 *Van der Kooy v Commission* ECLI:EU:C:1988:38, paras 53-55
[46] Case T-14/96 BAI v Commission, ECLI:EU:T:1999:12 para 80
[47] *Land Burgenland* (n 38), para 92; Case C-277/00 *Germany Commission* ECLI:EU:C:2004:238, para 80; Case C-390/98 *H.J. Banks & Co. Ltd v The Coal Authority and Secretary of State for Trade and Industry* ECLI:EU:C:2001:456, para 77
[48] Case C-124/10 P *Commission v EDF* ECLI:EU:C:2012:318, para 103
[49] Case C-276/02 *Spain v Commission* Opinion of AG Maduro ECLI:EU:C:2004:211, paras 36-37; Case C-303/88 *Italy v Commission* Opinion of AG van Gerven ECLI:EU:C:1990:352, paras 9, 11, 14
[50] Case C-305/89 *Italy v Commission* Opinion of AG van Gerven ECLI:EU:C:1991:4, paras 9, 11. See also: Commission Decision 2016/1991/EU of 4 July 2016 on the measures SA.41614 - 2015/C (ex SA.33584 - 2013/C (ex 2011/NN)) implemented by the Netherlands in favour of the professional football club FC Den Bosch in 's-Hertogenbosch [2016] OJ L 306/19, recital 51.
[51] See for example: Case T-358/94 *Air France v Commission* ECLI:EU:T:1996:194. Compare however with: Case C-303/88 *Italy v Commission* ECLI:EU:C:1991:136, para 21; Joined cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* ECLI:EU:C:1994:325, para 25
[52] Case T-228/99 *WestLB v Commission* ECLI:EU:T:2003:57, para 226. See also: Commission Decision 2017/97/EU of 4 July 2016 on the State Aid SA.40168 - 2015/C (ex SA.33584 - 2013/C (ex 2011/NN)) implemented by the Netherlands in favour of the professional football club Willem II in Tilburg [2017] OJ L 16/28, recitals 33-38
[53] *WestLB* (n 52), para 255; Arhold, Kreuschitz, Säcker, Soltesz, Shuette, Schwab (n 30), para 158

moderate in his pursuit of profits. Following from the MEO's reasonableness, in effect the MEO's behaviour must be economically rational.[54]

In this context, compliance with market conditions can thus be established based on empirical data, or where such data are not available, based on other methods, such as benchmarking.[55] Additionally, activities carried out "pari passu" by public entities and private operators,[56] and those carried out through an open, transparent, sufficiently well-publicised, non-discriminatory and unconditional tender procedure, as described in the Union's Public Procurement Directives,[57] will be deemed to be in accordance with market criteria. Practically, a generally accepted and standard assessment methodology must be employed,[58] and up-to-date, reliable data needs to be used.[59] The State has to *ex ante* evaluate the rationality of its intervention, with data available at the time of the intervention,[60] meaning that determining the timing of the assessment is also an important element of it.[61] The assessment must thus be derived from available, objective, verifiable, and reliable data.[62]

It is clear that the MEOP has several different iterations, all of which are based on the same core principle of comparing the State's actions to those of a comparatively relevant market economy operator. If the State's actions are line with those of such a hypothetical operator, then no advantage will be conferred, as the outcome would reflect market conditions. Based on the practical requirements, and on the characteristics ascribed to the MEO, it is possible to state that the MEO is reasonable, well-informed, prudent, and motivated by profits. Those characteristics, and the actions that would follow from them, inform the context of the application of the MEOP. The practical elements of the MEOP's application are also relevant, especially in relation to the methodological tools and data used to arrive at an economically rational assessment of the transaction in question.

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[54] Case C-224/12 P *Commission v Netherlands and ING Groep* ECLI:EU:C:2014:213, para 36; Case T-152/99 *Hijos de Andrés Molina, SA (HAMSA) v Commission* ECLI:EU:T:2002:188 para 80; Wolf Sauter and Harm Schepel, *State and Market in European Union Law: The Public and Private Spheres of the Internal Market before the EU Courts* (Cambridge University Press 2009), 206-207

[55] 2016 Notice (n 29), paras 83, 98

[56] Case T-296/97 *Alitalia v Commission* ECLI:EU:T:2000:289, para 81

[57] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L 94/243

[58] Case T-366/00 *Scott v Commission* ECLI:EU:T:2007:99, para 134

[59] Case C-290/07 P *Commission v Scott SA* ECLI:EU:C:2010:480, paras 95-97

[60] *EDF* (n 48), para 85

[61] Case C-486/15 P *Commission v France and Orange* ECLI:EU:C:2016:912, para 131

[62] Case T-274/01 *Valmont Nederland BV v Commission* ECLI:EU:T:2004:266, para 71

IV. The MEOP in Fiscal Cases

a. Applicability of the MEOP to Fiscal Cases

It is obvious from the foundational logic of the MEOP that it is not particularly well-suited to dealing with fiscal cases, as States enjoy a monopoly in the exercise of taxation.[63] This makes any actual comparison with a MEO conceptually and practically hard to carry out. The MEOP distinguishes between actions taken by the state in its capacity as an economic operator and its capacity as a public authority, and is only applicable in the former case.[64] This by extension means that there is no basis for comparison in most straightforward fiscal cases, even though its application cannot be automatically ruled out.[65] Taxation is inherently a policy instrument. Following the logic of the applicability of the MEOP, it would be easy to conclude that, since no private market operator has, even theoretically, the ability to grant tax exemptions or guarantee preferential tax treatment to undertakings, any fiscal measure would have to be viewed as falling within the purview of the State as a public authority, and therefore outside the scope of the MEO test. However, the flaw in this approach is apparent, as the foundational logic of the notion of advantage is concerned not only with whether the recipient has indeed received an economic advantage, but also whether that advantage could have been obtainable in normal market conditions.[66] Therefore, the MEOP should be seen as a general principle of the notion of advantage, and a constituent part of the State aid analysis, even for fiscal cases.[67] This can be demonstrated by the *EDF* saga.

EDF, in the process of its privatisation, received a capital injection in the form of a tax break on liabilities stemming from changes to special rules on concessions.[68] The French authorities claimed that the restructuring of EDF's accounts that gave rise to the aid was an investment into EDF, but the Commission rejected that argument due to the fiscal nature of the measure, since a private investor could not hold a tax claim over an undertaking.[69] On appeal, the EGC explained that the State's actions cannot be attributed to its exercise of State authority simply because it has access to or uses resources stemming from the exercise of such authority.[70]

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[63] Commission Decision 2011/527/EU of 26 January 2011 on State Aid C 7/10 (ex CP 250/09 and NN 5/10) implemented by Germany – Scheme for the carryforward of tax losses in the case of restructuring of companies in difficulty (Sanierungsklausel) [2011] OJ L235/26, recital 58

[64] Case C-334/99 *Germany v Commission* ECLI:EU:C:2003:55, para 134. See also: *Belgium v Commission* (n 43), para 13

[65] 2016 Notice (n 29), para 83

[66] *La Poste* (n 5), para 60; Case C-256/97 *Déménagements-Manutention Transport SA (DMT)* ECLI:EU:C:1999:332, para 22; *Altmark* (n 3), para 84

[67] *EDF* (n 48), paras 103-104

[68] Commission Decision 2005/145/EC of 16 December 2003 on the State Aid granted by France at EDF and the electricity and gas industries [2005] OJ L 49/9, recitals 24-28, 91

[69] *Ibidem*, recitals 94-97. See also: Arhold, Kreuschitz, Säcker, Soltesz, Shuette, Schwab (n 30), para 167

[70] Case T-156/04 *EDF v Commission* ECLI:EU:T:2009:505, para 232

Since States rely on their tax income (accrued through State authority) to participate in the economy, such a narrowing of the MEOP would render it "futile".[71] In the same vein, the Court held that the form of the measure cannot be taken to mean that the MEOP is not applicable.[72]

On a further appeal, this time from the Commission, the ECJ concurred with the EGC, and found that it is the Commission's responsibility to assess the relevant evidence needed to establish whether the MEOP is applicable.[73] The Court reiterated that a distinction between the State's activities as a MEO and a public authority must be maintained, with only the former being part of the analysis.[74] As such, the MEOP is a generally applicable part of the advantage criterion, and not an exception to it, meaning that its applicability must be examined in any given case, to allow for a complete consideration of the notion of advantage.[75] The recipient of the aid can invoke the MEOP themselves,[76] as if the MEOP could only be invoked by the granting State, then a recipient undertaking would have to disprove the existence of an advantage in lieu of the Commission having to prove it.[77] This is because the non-application of the MEOP would essentially mean that since the measure mitigated a charge normally applicable, the advantage condition would be deemed to be satisfied. Additionally, given that State aid is an objective concept, the classification of a measure as aid by a Member State does not mean that the Commission can assume that measure to indeed be aid.[78] This in effect means that the Commission is in charge of analysing both the applicability and the application of the MEOP.[79] This follows from the reasoning of *EDF*, as if the MEOP is seen as a general principle of the advantage analysis, then assessing its applicability is in effect a preliminary step in the analysis of an advantage.[80]

In *EDF*, since the objective (and the effect) of the measure was to inject capital into an undertaking, which is an economic objective that a market economy investor could pursue, it stands to reason that the MEOP could have been applicable. Based on a follow-up Decision and appeals all the way to the ECJ, it was established that

[71] *Ibidem*
[72] *Ibidem*, para 237
[73] *EDF* (n 48), para 86
[74] *Ibidem*, paras 79-80
[75] *Ibidem*, paras 92, 103-104
[76] Case C-300/16 P *Commission v Frucona Košice* ECLI:EU:C:2017:706, paras 23-28, 66; Case C-300/16 P *Commission v Frucona Košice* Opinion of AG Wahl ECLI:EU:C:2017:331, paras 72-73
[77] Oliver Geiss and Tatiana Siakka 'Redrawing the market economy operator test: EU State Aid law post Frucona' (2018) 39 European Competition Law Review 297, 299-300
[78] Case T-103/14 *Frucona Košice v Commission* ECLI:EU:T:2016:152, para 103. See also: paras 109, 117
[79] *Ibidem*, paras 139, 269
[80] *Frucona Košice II* Opinion of AG Wahl (n 76), paras 76-77

the MEOP was not *actually* applicable to the facts of *EDF*.[81] However, the follow-up judgments did confirm the principle that MEOP is in principle applicable to fiscal cases, even if they were not revolutionary.[82] From the *EDF* saga therefore it is clear that MEOP can be applicable in fiscal cases, as it is general principle of State aid law. Additionally, the line between a measure constituting an expression of State authority and one stemming from the actions of the State as a MEO was somewhat clarified, providing useful guidance on the occasionally overlooked element of applicability.[83]

In this context, it is worth examining the distinction between actions stemming from the exercise of public authority and those which reflect the State acting as a MEO to illustrate the applicability of the MEOP post-*EDF*. In her Opinion in *ING Groep*, AG Sharpston attempted to clarify the dichotomy between the applicability and application of the MEOP, stating that there needs to be a twofold analysis, where first it is necessary to examine whether the action of the State "can be meaningfully compared" with the act of a private market operator.[84] If this step is satisfied, then it is necessary to assess whether the action taken by the State was based on "considerations which are relevant only or at least primarily to the State in its capacity as public authority", or whether a market operator in a comparable situation might have taken the same or similar action.[85] In the same case, where following an original grant of aid the Netherlands were holding securities in ING, it was held that a restructuring amendment of the original aid should be evaluated in the context of the MEOP, despite being linked to a grant of aid which is quintessentially an expression of State authority, as the Netherlands held securities and could renegotiate their redemption in a manner potentially comparable to a MEO.[86] However, any risks and liabilities arising from the exercise of public authority cannot be taken into account in the evaluation of the aid character of any subsequent measures,[87] as they would not be relevant to a private operator. This is true even in cases where the State would benefit, from a purely rational and

[81] Commission Decision 2016/154/EU of 22 July 2015 on State Aid SA.13869 (C 68/2002) (ex NN 80/2002) – reclassification as capital of the tax-exempt accounting provisions for the renewal of the high-voltage transmission network (RAG) implemented by France in favour of EDF [2016] OJ L 34/152, recitals 126, 128-129, 136-144, 154; Case T-747/15 *EDF v Commission* ECLI:EU:T:2018:6, paras 241-242, 317-321; Case C-221/18 P *EDF v Commission* (Order) ECLI:EU:C:2018:1009, paras 16, 22, 29, 38, 46

[82] Jose Antonio Rodriguez Miguez, 'Clarifying the Applicability of the Private Investor Test' (2018) 17 European State Aid Law Quarterly 290, 295

[83] Małgorzata Agnieszka Cyndecka, 'The Applicability and Application of the Market Economy Investor Principle", (2016) 15 European State Aid Law Quarterly 381; Małgorzata Agnieszka Cyndecka 'The Applicability and Application of the Market Economy Investor Principle: Lessons Learnt from the Financial Crisis' (2017) 16 European State Aid Law Quarterly 512

[84] Case C-224/12 P *Commission v Netherlands and ING Groep* Opinion of AG Sharpston ECLI:EU:C:2013:870, para 35

[85] *Ibidem*

[86] *Ibidem*, paras 35-41; *ING Groep* (n 54), paras 31-37

[87] Case C-579/16 P *Commission v FIH Holding and FIH Erhversbank* ECLI:EU:C:2018:159, para 58

economic perspective, by a further intervention in the economy.[88] In effect, in the context of the applicability and application of the MEOP, in a meeting between law and economics, the former prevails.[89]

In brief, if a State measure can have an economic character, then the MEOP is, in principle, applicable, with the measure's economic soundness being ascertained in the application stage of the MEOP analysis. Thus, the applicability analysis looks at the economic character and nature of the intervention, and the application of it at is economic rationality.[90] Additionally, the application of the MEOP cannot be clouded by previous actions that did not have an economic character, and were the result of the exercise of State authority. Thus, significant difficulties that can arise from the indissoluble link between an act of the State as an economic operator and as a public authority. In a typical fiscal aid case, such as a tax exemption, despite the *de jure* possibility of the MEOP being applicable, it is *de facto* extremely unlikely that the principle will be indeed found to be applicable. It is clear in this context, that the applicability of the MEOP to fiscal cases will remain limited, as due to taxation being an area of exclusive State power, any comparison loses its meaning and becomes a purely theoretical, non-verifiable exercise. Nonetheless, the Commission is not absolved of its responsibility to evaluate the MEOP's applicability.

b. Application of the MEOP to Fiscal Cases

Based on the discussion above, it is clear the MEOP is unlikely to be found to be applicable in fiscal cases. However, one area where the MEOP has been found to be applicable to fiscal cases consistently and for a relatively long period of time is the repayment of tax debts, as the recovery of such debts is not materially different from the recovery of any other type of debt.[91] Thus, the private creditor iteration is the most relevant in relation to taxation.

Despite the intricacies of debt recovery and the multitude of moving parts (from the timescale of the debt the economic position of the creditor), the application of the MEOP has been relatively consistent. It has been held for example that accepting a rate of interest lower than those available on the market is not contrary to the MEOP, as a creditor is more preoccupied with facilitating the repayment of debts.[92] In this context, the relevant question is whether the facilities extended by the State are manifestly more generous than those a hypothetical, highly comparable private creditor would extend.[93] For example, tolerating the

[88] *Ibidem*, para 59; *Land Burgenland* (n 38), paras 97-99, 114
[89] Małgorzata Agnieszka Cyndecka, 'The MEOP in the FIH Case' (2018) 17 European State Aid Law Quarterly 546
[90] *ING Groep* Opinion of AG Sharpston (n 84), para 35; *ING Groep* (n 54), para 37
[91] *Spain v Commission* (n 44), para 46. See also: Arhold, Kreuschitz, Säcker, Soltesz, Shuette, Schwab, (n 30), para 205
[92] *Spain v Commission* (n 44), paras 46-49
[93] *DMT* (n 66), paras 24, 30; *DMT* Opinion of AG Jacobs (n 39), paras 34-36

long-term non-payment of debts is not in line the behaviour of a private creditor.[94] Given the distinction between the role of the State as a public authority and as a MEO, the fact that forcing a debtor into liquidation can result in the loss of future tax revenues for the State is irrelevant in the application of the MEOP,[95] as it is a consideration which is not related to the role of the State as a MEO. There is however a degree of ambiguity, as to which iteration of the MEOP should be applied, as a payment deferral can for example have characteristics similar to those of a loan.[96] In this context, it is worth noting that more than one iterations of the MEOP can be taken into account.[97]

Additionally, the MEOP should be fully applied and accompanied by an economic analysis which includes case-specific elements, looking at the type of debt, the amounts relative to other creditors, or the existence of securities. This economic analysis is necessary for the Commission's application of the MEOP to be substantiated.[98] The Commission cannot rely on a formulaic approach, and must take into account the relevant economic factors, as the CJEU can only review manifest errors of assessment, and cannot substitute the Commission's appraisal for its own.[99] This means in effect that if a conclusion is not properly reached and argued by the Commission in light of the economic factors at play, the Courts can call its soundness into question.[100] As the Courts cannot make up for any mistakes on the part of the Commission, factual mistakes and errors in the economic analysis effectively vitiate the advantage analysis.

Based on this brief discussion, it is possible to conclude that both the applicability and application of the MEOP to fiscal cases can be complicated. It is clear that the rationale of the MEOP can be applied to fiscal cases, and that thus its applicability must be examined. In practice however, the theoretical limitations of the MEOP mean that only cases pertaining to fiscal debts can be said to be well and truly within its scope of applicability. Even in such cases, the potentially privileged position of the tax authorities when compared to other regular creditors further showcases the difficulties in the application of the MEOP to cases relating to taxation.[101] Those issues demonstrate the case-specific nature of the MEOP both in

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[94] Case T-415/05 *Greece v Commission* ECLI:EU:T:2010:386, paras 383-384; Case T-68/03 *Olympiaki Aeroporia Ypiresies AE v Commission* ECLI:EU:T:2007:253, para 294; Case C-480/98 *Spain v Commission* Opinion of AG Mischo ECLI:EU:C:2000:305, paras 32-43

[95] Commission Decision 2007/254/EC of 7 April 2006 on State Aid C 25/2005 (ex NN 21/2005) implemented by the Slovak Republic for Frucona Košice, a.s. [2007] OJ L 112/14, recital 108

[96] *DMT* (n 66), paras 23-24. See also: *Spain v Commission* (n 44), para 46; *HAMSA* (n 54), para 167

[97] *FIH* (n 87), para 54

[98] Case C-525/04 P *Spain v Commission* ECLI:EU:C:2007:698, paras 51-54; *HAMSA* (n 54), paras 164-173

[99] Case C-525/04 P *Spain v Commission* Opinion of AG Kokott ECLI:EU:C:2007:73, paras 71-73

[100] *Spain v Commission* (n 98), paras 51-54; Case C-276/02 *Spain v Commission* ECLI:EU:C:2004:521, paras 35-37

[101] See for example: *HAMSA* (n 54), para 168; Case T-36/99 *Lenzing AG v Commission* ECLI:EU:T:2004:312, paras 101, 156, 160-162

terms of its applicability and in terms of its application in fiscal cases. However, even with this case-specific nature and the *de jure* lack of official distinction between fiscal and non-fiscal cases, it is clear that *de facto* the inherent logic of MEOP makes its applicability to most standard fiscal cases extremely complex.

c. Burden and Standard of Proof in the Application of the MEOP

A particularly interesting element of the applicability and application of the MEOP is the allocation of the burden of proof, and the standard of proof. This section will present the extent of the Commission's investigative obligations, and its obligation to state reasons. This analysis will use the *Frucona Košice* series of cases as an example.

Frucona Košice had financial difficulties, and took advantage of a Slovakian tax measure that allowed it to defer payments of excise duty on spirit. The local tax authority accepted the deferred payment of tax and took securities over assets held by Frucona Košice, while a change in the applicable legislation limited the latter's ability to obtain further deferrals on a regular basis, which led Frucona Košice to became further indebted to the tax authority, in addition to its already deferred payments. Frucona Košice applied for a debt arrangement with all its creditors (public and private), which was accepted by the creditors, and the regional Court. The agreement entailed a repayment of 35% of its debts in a short period after the agreement, while the rest of the debt would be forgiven. All the creditors, public and private were to be treated in exactly the same way, despite the fact that the tax authority held securities over part of the debt.[102] The Commission took the view that the tax authorities failed to act in a way consistent with the actions of a private creditor, as they did not press for a tax execution, or a bankruptcy procedure, that would have, according to the Commission's economic analysis, resulted in a higher amount of debt being recovered.[103] This is not an unreasonable conclusion, as the vast majority of Frucona Košice's debt was held by the tax authority, which could have recouped a substantial part of its debt by selling the secured assets.[104]

Even though the General Court upheld the Commission's reasoning,[105] on appeal the ECJ pointed out that the duration of the bankruptcy procedure was not taken into account in the application of the MEOP, meaning that the outcome of the test was erroneous, and that as a result the Commission had committed a "manifest error" in its assessment of the MEOP.[106] On an appeal from a new Decision stemming from the same facts,[107] the ECJ stated explicitly that the Commission's

[102] Frucona Košice Decision (n 95), recitals 17-31
[103] *Ibidem*, recital 99
[104] Raymond Luja, '(Re)shaping Fiscal State Aid: Selected Recent Cases and Their Impact' (2012) 40 INTERTAX 120, 123
[105] Case T-11/07 *Frucona Košice v Commission* ECLI:EU:T:2010:498, para 115
[106] *Frucona Košice I* (n 44), paras 100-103
[107] Geiss and Siakka (n 77), 298; Commission Decision 2014/342/EU of 16 October 2013 on State Aid No SA.18211 (C 25/2005) (ex NN 21/2005) granted by the Slovak Republic for Frucona Košice a.s. [2014] OJ L 176/38

analysis must "necessarily cover all the options" that a MEO could have encountered and envisaged.[108] This analysis must take into consideration all the relevant evidence, which is defined as all information liable to influence the decision-making process of a MEO available at the time of the contested measure, as well as any foreseeable developments.[109] Any information obtainable during the administrative procedure is deemed to be "available" information.[110]

This points to the role of the Union judicature, which is to verify that the evidence relied upon (such as the outcome of the MEOP analysis) is "factually accurate, reliable, and consistent", while also containing all the relevant information necessary to substantiate any findings.[111] In order for a concrete conclusion to be reached therefore, the Commission must have at its disposal "the most complete and reliable information possible".[112] The review of this information and of its completeness are consistent with the purpose of assessing a manifest error of assessment.[113] For example, *in casu*, the Commission failed to correctly evaluate the liquidation factors, meaning it committed such an error, and its conclusion was not up the requisite legal standard.[114]

As discussed above, the rationale of *EDF* and the MEOP's position as an integral part of the notion of advantage mean that the burden of proof on its applicability and application rests on the Commission.[115] This has been confirmed by the ECJ.[116] In relation to the applicability of the MEOP, if the economic character of the measure is obvious, the Commission can "implicitly and necessarily" assume that it is applicable by applying it.[117] In relation to the application of the MEOP, given the obligation to state reasons, and the requisite standard of proof, the Commission cannot conclude on the application of the MEOP (and by extension the existence of an advantage) without having all the relevant information,[118] as defined by the ECJ,[119] and without the conclusions it draws from said information being substantiated. In this context, it is important to stress that it is settled case law that

[108] *Frucona Košice II* (n 76), para 29
[109] *Ibidem*, paras 59-61
[110] *Ibidem*, para 71
[111] *Spain v Commission* (n 98), para 57. See also: *Spain v Commission* Opinion of AG Kokott (n 99), paras 71-74; Case C-73/11 P *Frucona Košice v Commission* Opinion of AG Kokott ECLI:EU:C:2012:535, paras 74-85
[112] *Scott* (n 59), para 90
[113] *Frucona Košice II* (n 76), paras 74-75
[114] *Ibidem*, para 82; *Frucona Košice* (n 78), paras 185, 196. A liquidation factor is the discount factor applied to assets to be liquidated, in order to assess the amount that their sale will raise, as opposed to their book value.
[115] *EDF* (n 48), paras 103-104; *Frucona Košice II* Opinion of AG Wahl (n 76), paras 76-77
[116] Case C-405/11 P *Commission v Buczek Automotive* ECLI:EU:C:2013:186, paras 33-34; *ING Groep* (n 54), para 33; *Frucona Košice II* (n 76), para 36
[117] Case T-100/17 *BTB Holding Investments and Duferco Participations Holding SA v Commission* ECLI:EU:T:2018:900, paras 51-57
[118] *Frucona Košice* (n 78), para 139
[119] *Frucona Košice II* (n 76), paras 59-61

the Courts cannot substitute the Commission's economic assessment for their own,[120] but they are under an obligation to establish the factual accuracy and credibility of the evidence and calculations relied upon, and the completeness of the evidence, in light of the complex situations that are being assessed.[121] This is essential, as it allows the Courts to review whether the conclusions the Commission has drawn can be substantiated.[122] The exact limits of the Courts' powers of review can be tricky to establish,[123] but it is clear that the required standard of proof is high.[124]

This stringent standard of proof associated with the MEOP is also applicable in straightforward fiscal cases, where the MEOP cannot be applied. This can be evidenced by the *Barcelona* case, where the Commission failed to examine the fiscal context of a reduced statutory tax rate, and by extension failed to ascertain whether the *effective* tax rate actually conferred an advantage on the undertakings concerned.[125] In effect, the Commission is not entitled to conclude that an advantage exists without carrying out the necessary economic analysis. Rather, it has to assess the specific characteristics of the sector under examination, and has to rely on a wide range of information, in order to be able to adhere to its obligation to present credible and verifiable findings.[126] A similar example can be found in *Real Madrid*, where the EGC held that the Commission must conduct a complete analysis of all relevant factors before being able to establish the existence of an advantage.[127] By analogy, this means that if the analysis is incomplete, it cannot in fact be proven that an advantage results from the contested measure, as the requisite legal standard cannot be met.[128]

This rationale echoes and makes very explicit a well-established line of CJEU case law,[129] and confirms that the standard of proof required by *Frucona Košice*, as well as the allocation of the burden of proof, also apply in the determination of a fiscal advantage in the absence of the MEOP.[130] This means that the Commission

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[120] *Commission v Spain* (n 98), para 57; *Frucona Košice I* (n 44), para 75; *Buczek* (n 116), para 49; *Frucona Košice II* (n 76) para 63

[121] *Ibidem*, para 57; para 76; para 50; and para 65 respectively.

[122] *Ibidem*

[123] Compare for example *Commission v Spain* (n 98), paras 51-54 and *Frucona Košice I* (n 44), paras 100-103, with *Commission v Spain* Opinion of AG Kokott (n 99), paras 71-74 and *Frucona Košice I* Opinion of AG Kokott (n 111), paras 74-85.

[124] *Frucona Košice II* (n 76) paras 75-76. See also: Case T-791/16 *Real Madrid Club de Fútbol v Commission* ECLI:EU:T:2019:346, paras 72, 76-78, 114-116, 125-129

[125] Case T-865/16 *Fútbol Club Barcelona v Commission* ECLI:EU:T:2019:113, para 38

[126] *Ibidem*, paras 58, 66-67

[127] *Real Madrid* (n 124) paras 114-116

[128] *Ibidem*, paras 125-129

[129] Case C-559/12 P *France v Commission* ECLI:EU:C:2014:217, para 63; *Scott* (n 59), para 90. See also: Begona Perez Bernabeu, 'How to Determine the Existence of a Tax Advantage: The F.C. Barcelona Case' (2019) 18 European State Aid Law Quarterly 377, 379-380; Case T-90/16 *Elche Club de Fútbol, SAD v Commission* ECLI:EU:T:2020:97

[130] *Barcelona* (n 125), paras 59-60

must, in its assessment of a fiscal advantage, take into consideration all the elements of the fiscal regime, favourable or unfavourable, in order to successfully discharge its burden of proof.[131] The detailed economic analysis required, and the fact that it must consider the fiscal context and environment in which the measure was adopted, represents a more fiscal outlook for the analysis of the notion of advantage. This requirement for a detailed economic analysis can also be said to follow from the effects-based approach to State aid, as it examines the effects rather than the form of a measure.[132] Such a fiscal approach can add more substance in the advantage analysis of fiscal cases, as it makes it necessary for the Commission to examine the whole picture, rather than formulaically "ticking the boxes". In effect, the adoption of a more fiscal outlook which follows from the depth of the economic analysis, beyond being more in line with the effects-based approach, recognises the complex nature of taxation and accepts that a *prima facie* beneficial fiscal rule, like the lower statutory rate in *Barcelona*, does not automatically translate to an advantage. In practical terms, this approach makes up to an extent for the inapplicability of the MEOP to the vast majority of fiscal cases, by adding significant economic weight to the analysis and contextualising the contested measure so that its effects may be accurately appraised.

Finally, as can be evidenced by cases like *Frucona Košice* and *Barcelona*, selectivity is not necessarily the be-all and end-all of the fiscal aid analysis, even if it affects its scope in a manner that the notion of advantage cannot. The notion of advantage is after all the basis around which the notion of aid exists, the remaining four criteria effectively examine the advantage's characteristics (selectivity and State resources), or its effects (effect on trade and distortion of competition). Since the (positively proven) existence of an advantage is the starting point of the State aid analysis,[133] it is absolutely reasonable to employ a high standard of proof, and to examine the fiscal context in which an advantage is claimed to exist. The approach detailed in this section, by adding a degree of complexity to the notion of fiscal advantage, effectively makes the distinction between selectivity and advantage easier and more obvious. As a result, beyond being more effects-oriented and less formalistic, this approach can also help maintain the structure of the State analysis by endowing its practical centrepiece with significant value. In effect, this approach ensures that even when the selectivity of a measure is obvious, as in the individual aid offered to *Frucona Košice*, its aid character is not a foregone conclusion.

d. Conclusion

In short, the very nature and foundational logic of the MEOP mean it struggles with fiscal cases. The way in which the principle evolved through the CJEU's jurisprudence indicates that its applicability to fiscal cases is, and will remain,

[131] Perez Bernabeu (n 129), 380
[132] *Ibidem*
[133] MOL Magyar Opinion of AG Wahl (n 1), para 47; Wattel (n 1), 61-64; Schön (n 25), 12, 16-17

practically limited, as taxation seldom can be dissociated from the exercise of State power, or meaningfully separated from the policy considerations underpinning any given fiscal system. These limitations are, unfortunately, the result of the MEOP's internal rationale. The application of the MEOP to fiscal cases, once the hurdle of applicability has been dealt with, is also potentially problematic, as any element of the factual background that results from the State's exercise of power can throw a spanner in the works. The rigidity of the construct of what MEO a given measure needs to be compared with, further limits the usefulness of the analysis as it discounts non-economic considerations. In the same vein, the application of the MEOP cannot be clouded by situations relating to the State's exercise of public authority. Thus, the MEOP is of limited use to fiscal cases.

Despite the limited applicability of the MEOP to fiscal cases, and the problems with its application when it is indeed applied, the high standard of proof it helped bring about has the potential to somewhat redress the balance, and ensure that the advantage criterion in fiscal cases does not become "devoid of substance" as Jaeger claims,[134] or automatically satisfied if the measure in question is selective. This, arguably, represents an extension of the underlying logic of the MEOP, that not every transactional intervention of the State in the economy represents an aid measure if it conforms to market conditions, into fiscal cases, as not every fiscal measure that results in a differential tax treatment represents an advantage unless it is established to do so based on its context and actual effects. The consistent application of a high burden of proof, which must also take into consideration the context and application of fiscal rules,[135] has the potential to make the criterion of advantage in fiscal cases as relevant and important as it is in non-fiscal ones, even given the limited usefulness of the MEOP. This approach in tax cases arguably represents a more fiscal outlook, which focuses on the fiscal realities in which the contested measure exists, while at the same time ensuring the structure of the State aid analysis and the distinction between the notions of advantage and selectivity.

V. Conclusion

This Chapter has looked at the notion of advantage, focusing on its application to fiscal cases. It has been shown that the analysis of a fiscal advantage can be reductive and simplistic, and somewhat based on the rationale of the notion of selectivity. In fiscal cases, this results from the conceptual similarities between the two notions. However, as discussed in the relevant Chapter, selectivity is more nuanced, as a derogation can be justified in the third step of the analysis, and the comparability analysis needs to be undertaken in light of the objectives of the measure or system. As such, the bare-bones fiscal advantage analysis is in fact an embryonic application of fiscal selectivity that discounts the nuance of justifications

[134] Jaeger (n 15), para 75
[135] *Barcelona* (n 125), paras 58-59, 66

and objectives. In this context, it has been shown that it is important to maintain the clear distinction between the two notions,[136] even if they have conceptual similarities. The fact that the reference framework used in the selectivity analysis is also the basis for the definition of "normal" market conditions does not mean that the two notions are one and the same, as assessing a departure (or derogation) from those conditions does not entail a comparability analysis, and such a departure needs to be proven to actually confer a benefit to its recipient. This does not mean that the two criteria are unrelated and have no influence on each other, but that they should remain clearly distinguished – a task that becomes difficult exactly because of the conceptual kinship between the two notions. However, beyond being separate criteria, they fulfil different roles in the rationale of a State aid analysis. The notion of advantage represents the starting point of that analysis, while selectivity, examines the limitation of that advantage to specific operators resulting in differential treatment, and is thus a necessary characteristic of a prohibited advantage. Neither a non-selective advantage nor a selective measure which results in no advantage are within the scope of the State aid prohibition.

The MEOP and its increasing sophistication can offer non-fiscal measures the possibility to escape the State aid prohibition, as long as any advantage is granted in accordance with market conditions, and this Chapter has demonstrated that, in principle, this *de jure* extends to fiscal cases,[137] even if its use remains limited due to the logic of the principle. Even in fiscal cases where the MEOP is actually applicable, the often-indissoluble link between an act of the State as an economic operator and as a public authority, and the often privileged position of the State mean that its application is far from straightforward. More importantly however, the burden and high standard of proof that permeate the MEOP analysis must also be applied, to the same level, in purely fiscal cases. The complex economic assessments that the Commission is called to undertake, requiring all relevant factors to be considered, can significantly increase the sophistication and relevance of the fiscal advantage analysis, and keep it separate from selectivity. Additionally, a full examination of the fiscal regime in the context of which an advantage is to be assessed is bound to be informed by the structure and logic of the tax system, and can as such lend the notion of (fiscal) advantage a more tax-oriented outlook. This approach is a welcome development, as it is in line with the effects-based notion of aid and recognises the fiscal context in which a contested tax measure must be examined.

It is clear that the advantage criterion in fiscal State aid is, due to its nature, less important than that of selectivity, as it does not have an influence on the scope of fiscal aid. However, it remains the starting point of any State aid analysis, and as

[136] *MOL Magyar* (n 23), para 59; *MOL Magyar* Opinion of AG Wahl (n 1), para 47
[137] *EDF* (n 48), paras 103-104

such its importance must not be discounted. As the MEOP will remain inapplicable to the vast majority of fiscal cases, the advantage analysis may have to, partly, follow the logic of the selectivity analysis. The fact that the construct of the MEO is artificial and concerned exclusively with profit making or obtaining the best possible outcome makes the principle's application to fiscal cases even more complex, as it discounts the policy considerations that tend to go hand in hand with taxation, thus greatly reducing its applicability. However, the Commission must in all cases examine the applicability of the MEOP. In general terms, as seen in this Chapter, the notion of advantage as it applies to fiscal cases can be notionally relatively easy to satisfy, although not as easy as Jaeger suggests.[138] However, this does not mean that the notion of advantage can or should be discounted when analysing the legal framework applicable to fiscal State aid. This perceived ease of satisfaction should not be used as an excuse to minimise the criterion's significance in the analysis of fiscal aid, especially in light of the evidential standard imposed on the Commission. The case law shows that a hasty and formalistic approach that hinges on a skin-deep analysis and does not take into consideration the actual (fiscal) effects of the measure cannot be allowed to stand. An advantage needs to be proven; it cannot be simply assumed, or even presumed. The extension of this logic and of the economic approach that the Commission employs to assess the MEOP to fiscal cases is of paramount importance, as it removes any formalism inherent in a hasty appraisal by the Commission or the judiciary, and makes sure a given measure is analysed in relation to its effects, ensuring that aid remains an objective concept. This approach arguably employs a more fiscal outlook, which in turn would mean that the existence of a fiscal advantage will continue to depend on case specific elements,[139] but would also take into consideration the realities of taxation and the fiscal environment in which a given measure exists.

[138] Jaeger (n 15), para 75
[139] *Ferring* Opinion of AG Tizzano (n 16), para 39

The Notions of State Resources, Effect on Trade, and Distortion of Competition

I. Introduction

The State aid prohibition contained in Article 107(1) TFEU defines prohibited aid based on five cumulative criteria. In most cases, only three of those are extensively analysed, namely selectivity, advantage, and whether said advantage was granted through State resources. The remaining two criteria, effect on trade and distortion of competition, are not unimportant but are rather easy to satisfy.[1] In fiscal cases, the State resources criterion can, generally, also be easily satisfied. Nonetheless, those three criteria and their application to fiscal cases need to be addressed. All three criteria exist in the wording of Article 107(1) and have therefore been part of the analytical framework of State aid since the beginning. The importance of the cumulative nature of the conditions of Article 107(1) cannot be understated.[2] Selectivity, advantage, and State resources are the three necessary characteristics of an aid, while the aid's effect on trade and distortion of competition are the negative jurisdictional limits of the State aid prohibition. Aids that do not have an effect on trade and do not distort competition will be outside the scope of Article 107(1), while measures that have an effect on trade and distort competition but fail to satisfy any one of the other three criteria will simply not be classified as aids.

This Chapter will discuss the notions of State resources, effect on trade, and distortion of competition focusing on how they apply to fiscal and parafiscal aids. A particular focus of this examination will be the differences, in relation to those three criteria, between fiscal and non-fiscal aids, as it will be shown that the rationale of those criteria means that their application to fiscal cases can be relatively simplistic. In this analysis, the latter two criteria will be combined, reflecting the consistent practice of the CJEU and the Commission.[3] This Chapter shows that the State resources criterion, which in non-fiscal cases has a significant effect on the scope of the State aid prohibition, is easily satisfied in fiscal cases. At the same time, the distortion of competition and effect on trade criteria will be shown to be very easily satisfied in general, and especially so in fiscal cases. This conclusion, read in conjunction with the previous Chapters in Part I, means that selectivity is in effect the only criterion of fiscal aid that influences the scope of the prohibition – practically

[1] Joined cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* Opinion of AG Jacobs ECLI:EU:C:1994:112, para 33

[2] Case C-142/87 *Belgium v Commission* ECLI:EU:C:1990:125, para 25; Joined Cases C-278/92, C-279/82, and C-280/92 *Spain v Commission* ECLI:EU:C:1994:325, para 20; Case C-482/99 *France v Commission* ECLI:EU:C:2002:294, para 68

[3] Commission Notice on the notion of State Aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, [2016] OJ C 262/01, para 186

it is the only criterion that *can* influence it. Thus, the analysis of the criteria of State resources, effect on trade, and distortion of competition showcases their inherent limitations when examined in and applied to fiscal cases, while also further underscoring the importance of selectivity in the context of fiscal State aid.

II. State Resources

From the wording of Article 107(1) it becomes clear that the criterion of State resources has itself two sub-criteria, namely aid granted "by a Member State or through State resources".[4] In plain terms, the two sub-criteria are essentially the use of State resources, and the fact that the measure in question is imputable to the State. The former of those is designed to bring within the purview of Article 107(1) measures involving both direct and indirect use of State resources.[5] Traditionally, these two sub-criteria have been interpreted as being cumulative.[6] This approach is not without detractors, as it seems to deviate from the wording of the Treaty, which uses the term "or" rather than "and" in the relevant part of Article 107(1).[7] Nonetheless, this Chapter will examine them as cumulative sub-criteria, reflecting the *jurisprudence constante* of the CJEU.

a. Imputability

i. Imputability in General

Imputability, as a concept, attributes the measure in question to the State. It is a reasonable condition, as it essentially means that aid needs to be imputable to the State, while ensuring that aid granted by institutions other than the State can still fit within the scope of the prohibition. Obviously, in relation to fiscal aid this element of the State resources criterion is particularly easy to satisfy, as taxation results from legislation, and as such is, in principle, clearly attributable to the State.[8] As Soltesz points out, the "grey area" that imputability as a concept is designed to deal with consists of public undertakings or public shareholders.[9] Imputability is essentially used to attribute the indirect use of State resources, usually through a public or private body set up to administer the aid, to the State itself. As a result, the

[4] *France v Commission* (n 2), para 32
[5] Case C-189/91 *Petra Kirsammer-Hack v Nurhan Sidal* ECLI:EU:C:1993:907, para 16
[6] *France v Commission* (n 2), para 24
[7] Thomas Jaeger 'Goodbye Old Friend: Article 107's Double Control Criterion' (2012) 11 European State Aid Law Quarterly 535, 536
[8] Case C-262/12 *Association Vent De Colère! Fédération nationale and Others v Ministre de l'Écologie, du Développement durable, des Transports et du Logement and Ministre de l'Économie, des Finances et de l'Industrie* ECLI:EU:C:2013:851, para 17
[9] Christoph Arhold, Viktor Kreuschitz, Franz Jürgen Säcker, Ulrich Soltesz, Michael Shuette, Andreas Schwab, 'Article 107 TFEU' in F J Säcker and F Montag (eds) *European State Aid Law* (Beck Hart Nomos 2016), para 264

imputability of a given measure can be relevant in parafiscal[10] cases, and only extraordinarily to fiscal measures.

The concept of imputability as part of the criterion of State resources was first considered in *Van der Kooy*, where the Court argued that a lower fixed rate for gas was the "result of action by the Netherlands state", falling within the notion of aid granted by a Member State.[11] Under this reasoning, imputability, as Soltesz argues, was used to extend the scope of the State aid prohibition, not limit it,[12] leading to a formalistic application of the notion by the Commission. In *Stardust Marine*, the Commission argued that the mere fact that the aid in question was provided by a subsidiary of an undertaking owned and controlled by the State was sufficient to establish the imputability of the measure,[13] but the ECJ rejected this approach, holding that the mere fact that a measure was taken by a public undertaking cannot classify such a measure as imputable to the State.[14]

Thus, State control over an undertaking cannot be "automatically assumed", but rather the degree of autonomy of the undertaking in question needs to be ascertained.[15] To this end, the Court offered a series of indicators of State control that could be used to establish the imputability of a measure adopted by a public undertaking or authority to the State, adding that whether the measure is actually imputable will depend on the circumstances, context, content and conditions attached to said measure.[16] In essence, this means that the more indicators are present, the better the chance of the measure being attributable to the State,[17] and that despite the general exercise of control by the State, the influence of the State in the adoption of the offending measure will need to be established.[18] The 2016 Notice on the Notion of Aid sets out some indicators that can be used to demonstrate imputability, including "organic" indicators linking the State to the body administering the aid.[19] Despite the possibility that the indicators-based

[10] "The Court designates charges dedicated to a particular purpose as "parafiscal charges". In the case of such charges, which are characterised by the fact that when they are levied they are already destined to finance a particular allocation of funds, State Aid law distinguishes between two transactions, namely the increase of State funds resulting from the levying of the charge and the use of those funds by allocating the proceeds to the recipient. The dedication of purpose creates a certain link between levy and allocation." Joined cases C-34/01 to C-38/01 *Enirisorse SpA v Ministero delle Finanze* Opinion of AG Stix-Hackl ECLI:EU:C:2002:643, para 167

[11] Joined Cases 67/85, 68/85, and 70/85 *Kwekerij Gebroeders van der Kooy BV and others v Commission* ECLI:EU:C:1988:38, paras 37-38

[12] Arhold, Kreuschitz, Säcker, Soltesz, Shuette, Schwab (n 9), paras 271-272

[13] *France v Commission* (n 2), para 48

[14] *Ibidem*, para 51

[15] *Ibidem*, para 52

[16] *Ibidem*, paras 55-57

[17] Case C-472/15 P *Servizi assicurativi del commercio estero SpA (SACE) and Sace BT SpA v European Commission* ECLI:EU:C:2017:885, paras 38-39

[18] *Ibidem*, para 34

[19] 2016 Notice (n 3), para 43

reasoning of the ECJ could lead to regulatory technique taking potential aid measures outside the scope of Article 107(1) TFEU, the application of said reasoning by the CJEU has proved flexible enough to generally prevent such outcomes.[20]

In short, the basic position of imputability looks at the influence or degree of control the State has on the granting body. It is recognised that the application of the notion of imputability will differ from case to case. This is the result of the indicators-based rationale endorsed in *Stardust Marine*, which necessitates such an analysis; the indicators essentially operate as a checklist, meaning that different factual patterns relate to different indicators.

ii. Parafiscal and Fiscal Imputability

This general position on, and approach to, the imputability of a measure to the State also applies to parafiscal charges. In most cases, such charges are easily attributable to the State, as they involve clear elements of State control, which under *Stardust Marine* can be seen as sufficient indicators. It is common for bodies administering parafiscal levies to be set up under public law by the State, and have limited economic activity, besides the administration of the levies.[21] This situation would satisfy a number of important indicators, including organic ones. It is also not uncommon for the funding of the entity itself to be an indicator of imputability. The level of State control over the financing methods can be an indicator of imputability,[22] and could also qualify under the State authority supervision indicator mentioned in the 2016 Notice. Despite the case-specific character of the indicator-based rationale of imputability, given the nature and purpose of what Jaeger describes as "typical" parafiscal entities,[23] and the list of indicators found in the 2016 Notice, it is clear that standard parafiscal arrangements will be, in principle, attributable to the State.

However, this is not always the case. For example, in *Pearle,* a trade association started a self-funded, "purely commercial" advertising campaign. Even though the association was set up under public law and supervised by the State, it

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[20] See for example: Case T-384/08 *Elliniki Nafpigokataskevastiki AE Chartofylakeiou, Howaldtswerke-Deutsche Werft GmbH and ThyssenKrupp Marine Systems AG v Commission* ECLI:EU:T:2011:650, paras 56-59, 68-69; T-387/11 *Nitrogénművek Vegyipari v Commission* ECLI:EU:T:2013:98, paras 63-66; Case T-251/11 *Austria v Commission* ECLI:EU:T:2014:1060, paras 70-75; Case T-305/13 *Servizi assicurativi del commercio estero SpA (SACE) and Sace BT v Commission* ECLI:EU:T:2015:435, paras 61-63, 82

[21] See for example: Case 74/76 *Iannelli & Volpi SpA v Ditta Paolo Meroni* ECLI:EU:C:1977:51, para 9; Case 78/76 *Steinike und Weinlig v Germany* ECLI:EU:C:1977:52, para 1; Case 94/74 *Industria Gomma Articoli Vari IGAV v Ente nazionale per la cellulosa e per la carta ENCC* ECLI:EU:C:1975:81, para 9; Case 259/85 *France v Commission* ECLI:EU:C:1987:478, para 2

[22] Case C-355/00 *Freskot AE v Elliniko Dimosio* ECLI:EU:C:2003:298, para 81

[23] Thomas Jaeger, 'Tax Measures' in F J Säcker and F Montag (eds) *European State Aid Law* (Beck Hart Nomos 2016), para 27

was found to enjoy a sufficient degree of autonomy, meaning that the measure could not be attributed to the State.[24] Similarly, in *Doux Élevage* the Court held, in relation to an inter-trade group, that neither the recognition, and subsequent conferral of powers to an inter-trade organisation, nor the extension of an agreement establishing the contributions to such an organisation can be imputable to the State.[25] Those two cases demonstrate that trade associations or other bodies whose form and general functions are set out in legislation and who operate under the supervision of the State, can still maintain sufficient independence to serve the interests of their members without breaching the State aid prohibition. The independence of the financing method seems to be of paramount importance.[26]

As mentioned above, the imputability of fiscal measures is in most cases very straightforward, since taxes are controlled by the State, in their design, administration, and collection. The State is in other words clearly in control of adopting and enforcing the relevant tax measure. However, under the indicators-based approach, it is possible, in principle, for fiscal measures to not satisfy this criterion. In *Deutsche Bahn*, it was argued that a tax exemption for aviation fuel was a result of Council Directive 92/81/EEC.[27] The General Court accepted this argument, stating that the exemption was merely the result of the transposition of the Directive into national law, and as such was attributable to EU itself.[28] Similarly, in *Puffer* the ECJ stated that the differences in treatment caused by the deduction of VAT input tax payable followed from the very nature of the Sixth Council Directive 77/388/EEC,[29] and as a result could not be attributed to a Member State.[30] It is worth noting that the non-imputability of a legislative measure (fiscal or otherwise) implementing EU legislation would reasonably only stand to the extent that the Member State in question has no discretion in the implementation process.[31] For example, Article 11 of Directive 2003/87/EC clearly states that the implementation of the emission allowance trading scheme will need to be carried out in accordance

[24] Case C-345/02 *Pearle BV, Hans Prijs Optiek Franchise BV and Rinck Opticiëns BV v Hoofdbedrijfschap Ambachten* ECLI:EU:C:2004:448, paras 7-15, 37, 40

[25] Case C-677/11 *Doux Élevage SNC and Coopérative agricole UKL-ARREE v Ministère de l'Agriculture, de l'Alimentation, de la Pêche, de la Ruralité et de l'Aménagement du territoire and Comité interprofessionnel de la dinde française (CIDEF)* ECLI:EU:C:2013:348, paras 36-41

[26] *Ibidem*, paras 32, 40; *Pearle* (n 24), para 15

[27] Council Directive 92/81/EEC of 19 October 1992 on the harmonization of the structures of excise duties on mineral oils [1992] OJ 1992 L316/12, Article 8(1)(b)

[28] Case T-351/02 *Deutsche Bahn v Commission* ECLI:EU:T:2006:104, para 102

[29] Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment [1977] OJ 1977 L 145/1

[30] Case C-460/07 *Puffer v Unabhängiger Finanzsenat, Außenstelle Linz* ECLI:EU:C:2009:254, paras 68-71; Case C-460/07 *Puffer v Unabhängiger Finanzsenat, Außenstelle Linz* Opinion of AG Sharpston ECLI:EU:C:2008:714, para 70

[31] See: Case C-272/12 P *Commission v Ireland and Others* ECLI:EU:C:2013:812, paras 45-53

with Article 107 TFEU.[32] Finally, in *Commission v Spain* it was held that advantages created by the passing on of a direct fiscal advantage as a result of a combination of legal transactions between private entities cannot be imputable to the State.[33] This of course does not affect the imputability of the original advantage, but showcases that secondary spill-over advantages, even those resulting from fiscal measures, cannot be attributed to the State.

In short, a finding of parafiscal imputability, as with normal imputability, will depend on the specifics of the case. Due to their nature and inherent characteristics, standard parafiscal measures will be easily attributable to the State. However, as the case law shows, the case-by-case approach means that parafiscal bodies can indeed be independent enough for their actions to not be imputable. In relation to pure fiscal measures, imputability is by definition satisfied, unless the offending measure forms part of the implementation of EU law. Despite this, secondary fiscal advantages cannot by attributable to the State.

iii. Conclusion

The imputability element of the State resources criterion aims to attribute a measure to the State, so that it can be classified as State aid. Despite the sub-criterion's formalistic origins, it has evolved through the case law to look at various indicators that can show whether and to what extent the authorities of a Member State can exercise power over a potential aid measure. The current form of the criterion is quite functional, taking into consideration various aspects of the relationship of the body involved and the State authorities. Due to the nature, purpose, and structure of a typical parafiscal entity, this indicators-based approach tends to attribute parafiscal schemes to the State, unless the bodies administering them are truly independent. In terms of fiscal imputability, most tax measures will, by definition, be attributable to the State, unless they are the result of the State implementing Union legislation with limited or no discretion. What this section has aimed to show is that in purely fiscal matters imputability is normally *de facto* satisfied, while parafiscal measures have a high chance of satisfying this sub-criterion, due to the importance of "organic" indicators, and the form and legal status of typical parafiscal entities. In effect, the imputability sub-criterion can be said to be of little to no relevance for the purposes of fiscal aid.

b. Burden on State resources

i. Foundational Case Law

The second limb of the analysis of the notion of State resources entails a burden being placed on the State's financial resources. However, this concept is

[32] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] OJ 2003 L 275/32, Article 11

[33] Case C-128/16 P *Commission v Spain and Others* ECLI:EU:C:2018:591, para 95

wider than this wording suggests. It was introduced in its current form in *Van Tiggele*, where the ECJ, deciding on a minimum pricing scheme for alcohol, stated that an advantage was present, but that said advantage was not granted through State resources,[34] as it did not result in any expenditure or loss of revenue for the State.[35] However, the distinction between an expenditure of State resources and the State measure itself is not necessarily clear in the wording of the Treaty, as the Court remarked in *Commission v France*.[36] In that case, the Court argued, disregarding the *Van Tiggele* judgment, that aid need not necessarily be financed from State resources.[37] Even though the resources used were not taken from the State budget, the fact they were the resources of a State body was enough for the Court to consider them to be State resources.[38] The *Van Tiggele* judgment was thus qualified, or arguably overruled,[39] by *Commission v France*. The Court seems to have confirmed *Commission v France* implicitly in *Van der Kooy*, finding that the attribution of the measure to the State was sufficient to satisfy the criterion in question,[40] and explicitly in *Greece v Commission*.[41] Nonetheless, at the same time the Court seems to have applied at least the spirit of *Van Tiggele*, necessitating a direct or indirect link between the measure and loss of revenue for the State.[42] This divergence demonstrates that from the early application of the notion of a burden on State resources, its limits have not been clear. What may not become apparent at first glance however is that the interpretation of this sub-criterion, as well as its limits, are particularly important elements in relation to width of the State aid prohibition.[43] This results from the fact that a requirement that aid must be financed by State resources or result in expenditure or loss of revenue narrows the scope of Article 107(1) TFEU.

In *Sloman Neptun* the Commission argued that a reduction of personnel costs which led to lower taxes being collected represented a burden on the State's resources, but the ECJ held that the reduction in tax and social contributions revenue did not create any additional burdens for the State.[44] The Court explained that the purpose of the distinction between aid granted by the State and aid granted

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[34] Case 82/77 *Openbaar Ministerie v Jacobus Philippus van Tiggele* ECLI:EU:C:1978:10, para 25
[35] Case 82/77 *Openbaar Ministerie v Jacobus Philippus van Tiggele* Opinion of AG Capotorti ECLI:EU:C:1977:205, para 8
[36] Case 290/83 *Commission v France* ECLI:EU:C:1985:37, para 14
[37] *Ibidem*
[38] *Ibidem*, para 15
[39] Marco M Slotboom, 'State Aid in Community Law: A Broad or Narrow Definition?' 1995 (20) European Law Review 289, 293
[40] *van der Kooy* (n 11), paras 32-38
[41] Case C-57/86 *Greece v Commission* ECLI:EU:C:1988:284, para 12
[42] Case 72/79 *Italy v Commission* ECLI:EU:C:1980:109, paras 21, 24-25; Case C-102/87 *France v Commission* ECLI:EU:C:1988:391, para 14
[43] Slotboom (n 39), 293; Arhold, Kreuschitz, Säcker, Soltesz, Shuette, Schwab (n 9), para 302
[44] Joined Cases C-72/91 and C-73/91 *Firma Sloman Neptun Schiffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG* ECLI:EU:C:1993:97, para 21

through State resources is to bring within the scope of State aid not only aid granted directly by the State, but also aid "granted by public or private bodies designated or established by the State",[45] but still granted through State resources.[46] This judgment serves as very useful dividing line, as it squarely places the non-creation of additional (tax) revenue outside the scope of State aid, as AG Darmon remarked in his (dissenting) Opinion.[47] In this context, Jaeger argues that there needs to be a "tangible correlation" between the State measure and the expenditure.[48] The ECJ has reaffirmed this position, stating that a measure which does not entail a direct or indirect use of State resources cannot be seen as State aid.[49]

Further guidance on what constitutes a burden on State resources can be found in *Preussen Elektra*. The contested measure imposed in effect a high minimum price on electricity generated from renewable sources, the purchasers of which could apportion the burden stemming from the obligatory high prices between themselves and upstream network operators.[50] The ECJ observed that the structure of the system resulted in private undertakings shouldering the costs of the minimum price, and as such resulted in no transfer of State resources, despite the obvious existence of an advantage and the statutory origins of the scheme.[51] Importantly, the ECJ also reiterated *Sloman Neptun*, stating that the possible, if not likely, decrease of the profits of the undertakings apportioning the expenditure stemming from the minimum price and the subsequent diminution of tax revenue cannot be seen as the means through which the advantage is granted,[52] and as such is not related to the contested measure, being too remote.[53] It is important to note

[45] *Ibidem*, para 19
[46] *Ibidem*, paras 19-20
[47] Joined Cases C-72/91 and C-73/91 *Firma Sloman Neptun Schiffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG* Opinion of AG Darmon ECLI:EU:C:1992:130, para 66
[48] Jaeger, 'Tax Measures' (n 23), para 22. See also: Joined cases C-52/97, C-53/97 and C-54/97 *Epifanio Viscido, Mauro Scandella and Others and Massimiliano Terragnolo and Others v Ente Poste Italiane* Opinion of AG Jacobs ECLI:EU:C:1998:78, paras 15-16
[49] See for example: *Kirsammer-Hack* (n 5), paras 16-17; Joined cases C-52/97, C-53/97 and C-54/97 *Epifanio Viscido, Mauro Scandella and Others and Massimiliano Terragnolo and Others v Ente Poste Italiane* ECLI:EU:C:1998:209, para 13; Case C-200/97 *Ecotrade Srl v Altiforni e Ferriere di Servola SpA (AFS)* ECLI:EU:C:1998:579, para 35; Case C-295/97 *Industrie Aeronautiche e Meccaniche Rinaldo Piaggio SpA v International Factors Italia SpA (Ifitalia), Dornier Luftfahrt GmbH and Ministero della Difesa* ECLI:EU:C:1999:313, para 35
[50] Case C-379/98 *PreussenElektra AG v Schhleswag AG, in the presence of Windpark Reußenköge III GmbH and Land Schleswig-Holstein* ECLI:EU:C:2001:160, paras 6-10
[51] *Ibidem*, paras 59-61
[52] *Ibidem*, para 62
[53] *Viscido* (n 49), para 15; *Viscido*, Opinion of AG Jacobs (n 48), paras 15-16; Case C-200/97 *Ecotrade Srl v Altiforni e Ferriere di Servola SpA (AFS)* Opinion of AG Fennelly ECLI:EU:C:1998:378, para 24

that the *Preussen Elektra* rationale is limited by the facts of the case, as can be seen in subsequent case law, like *Essent Netwerk*.[54]

A number of AGs have argued that measures by which the State can impose favourable conditions for the benefit of certain undertakings or products without having to spend any money should be deemed to be granted through State resources,[55] even in the lack of actual expenditure. This represents an argument for a wide interpretation of the sub-criterion, as opposed to the narrow one that the Court ended up adopting in *Sloman Neptun* and the subsequent case law. This more expansive approach is based on the notion that requiring an actual expenditure is needlessly stiff and formalistic,[56] and does not focus on the effects of the measure, but on the origin of the aid.[57] The argument ran that the narrower construct could, as the limits of the notion of State resources were not clear, lead to situations where State aid control cannot intervene in clearly problematic situations that would not be covered under other Treaty provisions.[58] Countering those arguments, AG Jacobs in *Preussen Elektra* explained that the narrower approach was more consistent with the wording and purpose of Article 107(1), with a systematic reading of State aid law which necessarily includes Article 108 TFEU, and with the structure of EU law in general.[59] More importantly however, he explained that measures having equivalent effect to State aid should not be within the scope of the prohibition, as such an approach would be an improper widening of the concept of State aid.[60]

It is submitted that a wide interpretation, such as the one suggested by AG Darmon,[61] Slotboom,[62] or Ross[63] is problematic. For one, it removes a necessary link

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[54] Case C-206/06 *Essent Netwerk Noord BV supported by Nederlands Elektriciteit Administratiekantoor BV v Aluminium Delfzijl BV, and in the indemnification proceedings Aluminium Delfzijl BV v Staat der Nederlanden and in the indemnification proceedings Essent Netwerk Noord BV v Nederlands Elektriciteit Administratiekantoor BV and Saranne BV* ECLI:EU:C:2008:413, para 74

[55] *Sloman Neptun* Opinion of AG Darmon (n 47), paras 40-41, 47; Case C-57/86 *Greece v Commission* Opinion of AG Slynn ECLI:EU:C:1988:104, 2866-2867; Joined cases 213/81, 214/81, and 215/81 *Norddeutsches Vieh- und Fleischkontor Herbert Will, Trawako, Transit-Warenhandels-Kontor GmbH & Co., and Gedelfi, Großeinkauf GmbH & Co., v Bundesanstalt für landwirtschaftliche Marktordnung* Opinion of AG van Themaat ECLI:EU:C:1982:218, 3617

[56] Julio Baquero Cruz and Fernando Castillo De La Torre, 'A note on PreussenElektra' (2001) 26 European Law Review 489, 492

[57] Slotboom (n 39), 296

[58] *Ibidem*, 298; See also: Malcom Ross, 'State Aids: Maturing into a Constitutional Problem' (1995) 15 Yearbook of European Law 79

[59] Case C-379/98 *PreussenElektra AG v Schhleswag AG, in the presence of Windpark Reußenköge III GmbH and Land Schleswig-Holstein* Opinion of AG Jacobs ECLI:EU:C:2000:585, paras 151-153, 155-156, 158

[60] *Ibidem*, paras 183-185. See also: *Viscido* Opinion of AG Jacobs (n 48), para 17; Case 290/83 *Commission v France* Opinion of AG Mancini ECLI:EU:C:1984:379, para 2

[61] *Sloman Neptun* Opinion of AG Darmon (n 47), paras 40-41

[62] Slotboom (n 39), 289-301

[63] Ross (n 58)

in the chain of what constitutes a State aid; in the absence of a requirement of (some) burden on the State's resources, any State intervention in the economy, any regulatory act that has intended or unintended consequences could fall within the scope of State aid, if it satisfies the criterion of selectivity. The proposition that selectivity can effectively shift through essentially all regulations introduced by all Member States to ensure that they do not favour certain undertakings or sectors of economic activity is problematic, as selectivity would be satisfied for example by any intervention that favours a company of a certain size,[64] or type[65] more than others, or undertakings producing goods as opposed to those providing services.[66] If we follow the rationale of the wider interpretation, keeping in mind that selectivity is preoccupied with the effects of a given measure,[67] we end up in a situation where, for example, a regulatory measure providing for a simpler tax form to be filled in for undertakings with a turnover under a specified amount (which could lead to lower compliance costs for the undertakings that fall within the threshold therefore benefitting them as opposed to larger undertakings by mitigating charges normally borne) would be classed as aid, despite having no effect on the State's resources.[68] Additionally, such a wide interpretation would result in significant overlap between State aid, and the Treaty provisions on fundamental freedoms and harmonisation,[69] which arguably would be better suited to deal with the problematic elements of regulatory measures.[70] An argument based on safeguarding the effectiveness of Articles 107 and 108 when read in conjunction with the duty of sincere cooperation,[71] in light of the objective of preventing distortions of competition,[72] was squarely rejected by the Court, which argued that the notion of sincere cooperation cannot be used to extend the scope of the State aid prohibition.[73] This showcases that the Court did not deem the issue posed by cases like *Sloman Neptun* or *Preussen Elektra*, where an advantage was recognised but found to be outside the scope of State aid control, as a systemic one.[74] As will be discussed in

[64] Case C-409/00 *Spain v Commission* ECLI:EU:C:2003:92, para 50
[65] Case C-233/16 *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Generalitat de Catalunya* ECLI:EU:C:2018:280, para 61
[66] Case C-143/99 *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten* ECLI:EU:C:2001:598, para 52
[67] Case C-75/97 *Belgium v Commission* ECLI:EU:C:1999:311 para 25
[68] This is not to say that selectivity is not extremely useful in determining the aid character of a given measure; for example in the absence of selectivity and with the State resources criterion assuming its central analytical role, a lowering of the corporate tax rate could be seen as State Aid, despite being universal.
[69] Arhold, Kreuschitz, Säcker, Soltesz, Shuette, Schwab (n 9), para 303. See also: *Commission v France* Opinion of AG Mancini (n 60), para 2
[70] Piet Jan Slot, 'Joined Cases C-72/91 and C-73/91 *Sloman Neptun Schiffahrts AG v. Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts A.G.*' (1994) 31 Common Market Law Review 137, 143-144
[71] Then encompassed in Article 10 E.C.; its surviving elements can now be found in Article 3(3) TEU.
[72] Then encompassed in Article 3(f) of the Treaty of Rome (E.E.C.)
[73] *PreussenElektra* (n 50), para 65
[74] Baquero Cruz and Castillo De La Torre (n 56), 496

the following section, the (valid) fears expressed at the time that certain measures could escape effective State aid control because of the narrowness of this construct, have not been vindicated.

In brief, the sub-criterion of State resources has been interpreted in a way that necessitates an expenditure of State resources, or at the very least a burden being placed on those resources. There needs to be a link between the advantage and State resources, direct or indirect.[75] Additionally, it is established that an incidental loss of revenue will not meet the threshold of burdening a State's resources. To fully assess the arguments put forward for either interpretation, and to determine the function of the sub-criterion, it is now necessary to examine the limits of the notion of a burden on State resources.

ii. Limits of the notion of a burden on State Resources

First of all, it is worth noting that a measure can be financed through Union resources, if it stems from Union legislation.[76] Similarly, measures financed through member contributions are not seen as placing a burden on the State's budget.[77] However, if the "burden" is on the State's resources, the Court has held, especially in relation to taxation, that a *transfer* of State resources is not necessary for the sub-criterion to be satisfied.[78] The width of the concept of aid, as defined in *Steenkolenmijnen*,[79] means that it necessarily must encompass interventions that mitigate the charges normally included in the budgets of undertakings. A tax break, which represents such a mitigation of charges, does not, strictly speaking, create an additional expenditure of State resources; it does however create a *burden*, in the sense that it represents funds not collected and therefore effectively removed from the State's budget. The Court has held that if an advantage exists, it is not always necessary to show that a transfer of State resources took place.[80] However, given that not every advantage is granted by State resources, further analysis is necessary.[81]

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[75] *Viscido* (n 49), para 15

[76] Joined Cases 213/81, 214/81, and 215/81 *Norddeutsches Vieh- und Fleischkontor Herbert Will, Trawako, Transit-Warenhandels-Kontor GmbH & Co., and Gedelfi, Großeinkauf GmbH & Co., v Bundesanstalt für landwirtschaftliche Marktordnung* ECLI:EU:C:1982:351, para 22

[77] *Doux Élevage* (n 25), paras 36-37

[78] Case C-387/92 *Banco Exterior de España v Ayuntamiento de Valencia* ECLI:EU:C:1994:100, para 14; Case C-6/97 *Italy v Commission* ECLI:EU:C:1999:251, para 16; *France v Commission* (n 2), para 36

[79] Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* ECLI:EU:C:1961:2, 19; *Belgium v Commission* (n 67), para 23; Case C-156/98 *Germany v Commission* ECLI:EU:C:2000:467, para 25

[80] *Banco Exterior* (n 78), paras 13-14; *France v Commission* (n 2), para 36. See also: *Italy v Commission* (n 78), para 16

[81] See for example: *Sloman Neptun* (n 44), para 21; *PreussenElektra* (n 50), paras 59-61

There needs to be a "sufficiently direct link" between a burden on State resources, actual or "sufficiently likely", and the advantage conferred, without the need for the two to correspond or be equivalent.[82] For example, offering something on the market for less than it is actually worth represents a loss of revenue, and allowing for a conditional partial exemption from a compulsory charge, also represents a loss of revenue.[83] This holds true even if the State does not lose money, as it still earns less that it should; the mere deprivation of sources of liquidity can reduce the State's budget.[84] In effect, foregoing revenue which could have been collected represents a "burden" on State resources.[85] Similarly, a "sufficiently concrete risk" of imposing additional burdens on the State in the future, like a guarantee, can be classified as a burden on the State's budget.[86] Arguably, properly compensating that risk in line with the MEOP would mean that no additional burdens would arise.[87] In effect, if a State engages in economic activity and does not act in conformity with the MEOP, it is foregoing revenues, thus placing a burden on its resources.[88] However, this does not apply in the reverse, meaning that fiscal measures which provide for exemptions but whose result, via tax competition, is the increase of the State's tax revenues are still deemed to place a burden on State resources.[89] This follows from the fact that "granted through State resources" is a qualification of the advantage, which has to be judged on its own merits and not as part of the enacting State's general economic or fiscal policy.

Additionally, where the resources of a body administering aid are held by the government, or are at least under its control, those resources can be categorised as State resources,[90] meaning that spending them would result in a burden to the State's budget. This approach of examining the effective control over the funds arguably represents a middle ground between the narrow and expansive interpretations of the State resources criterion. However, even under this middle

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[82] Joined Cases C-399/10 P and C-401/10 P *Bouygues SA and Bouygues Télécom SA v Commission and Others* and *Commission v France and Others* ECLI:EU:C:2013:175, paras 109-110
[83] Case C- 279/08 P *Commission v The Netherlands (NOx)* ECLI:EU:C:2011:551, paras 102, 106-108
[84] Case C-690/13 *Trapeza Eurobank Ergasias AE v Agrotiki Trapeza tis Ellados AE (ATE) and Pavlos Sidiropoulos* ECLI:EU:C:2015:235, paras 28-29
[85] *Ibidem*, paras 111-112
[86] *Bouygues* (n 82), paras 96-97, 101-107, 109. See also: Case C-559/12 P *France v Commission* ECLI:EU:C:2014:217, para 95
[87] *Ecotrade* (n 49), paras 43-44; Arhold, Kreuschitz, Säcker, Soltesz, Shuette, Schwab (n 9), para 332; *France v Commission* (n 86), para 95
[88] Case T-423/14 *Larko Geniki Metalleftiki kai Metallourgiki AE v Commission* ECLI:EU:T:2018:57, paras 93-102, 149-150. See also: Case C-518/13 *Eventech Ltd v The Parking Adjudicator* ECLI:EU:C:2015:9, para 47; Case 52/76 *Luigi Benedetti v Munari F.lli s.a.s.* Opinion of AG Reischl ECLI:EU:C:1976:184
[89] Joined cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission* ECLI:EU:C:2006:416, paras 127-129; Commission Decision 2003/515/EC of 17 February 2003 on the State Aid implemented by the Netherlands for international financing activities [2003] OJ L 180/52, recital 84
[90] *France v Commission* (n 2), para 37; Case C-83/98 P *France v Ladbroke Racing and Commission* ECLI:EU:C:2000:248, para 50

ground, the potential financial consequences of regulatory measures do not create a burden on State resources, as long as they are inherent parts of the statutory system in question.[91] This for example applies to the loss of debts owed to public authorities, *if* their non-repayment is in line with national insolvency laws.[92] Regardless, the State needs to actually have effective control over the monies for their expenditure to become a burden on State resources.[93] If funds are earmarked to finance the measure in question, then they are at no point made available to the State to dispose of as them pleases, and therefore are not under its effective control.[94] In this context, the mere passing of the funds through the State's budget seems to be sufficient to taint them in the eyes of the law.[95] Essentially, if the State could have allocated the funds to its own budget,[96] by not doing so it is foregoing potential revenue, negatively impacting its own budget.[97] The element of State control can be used to examine both the origin and destination of the funds,[98] as the State does not need to own the resources, as indicated by the case law, as long as it "constantly" has control over them, even if the resources themselves are private in their origin.[99]

In summary, the limits of exactly what can potentially fall within the scope of State resources are still not crystal clear, as evidenced by some fringe cases.[100] It is clear that the Union's judicature has applied the *Sloman Neptun* line of case law in a way that circumvents its apparent formalism. "Effective control", "foregone revenues", and "concrete risk" within the notion of a burden on State resources can generally be argued to represent legal fictions which have created a regime where, despite the establishment of a narrow interpretation of the State resources sub-

[91] *Ecotrade* (n 49), para 36
[92] *Ibidem*, paras 40-44; *Piaggio* (n 49), paras 42-43
[93] See for example: *Essent Netwerk* (n 54), paras 67-73; *Vent De Colère!* (n 8), paras 21, 33, 37
[94] *Pearle* (n 24), paras 36-41; Case C-222/07 *Unión de Televisiones Comerciales Asociadas (UTECA) v Administración General del Estado* ECLI:EU:C:2009:124, paras 41-44; Case T-136/05 *EARL Salvat père & fils, Comité interprofessionnel des vins doux naturels et vins de liqueur à appellations contrôlées (CIVDN) and Comité national des interprofessions des vins à appellation d'origine (CNIV) v Commission* ECLI:EU:T:2007:295, paras 115, 137, 142-145, 157, 165
[95] *Doux Élevage* (n 25), paras 32, 35; Case T-25/07 *Iride SpA and Iride Energia SpA v Commission* ECLI:EU:T:2009:33, para 24-28
[96] *Pearle* (n 24), para 36
[97] *NOx* (n 83), para 104
[98] *Vent De Colère!* (n 8), para 25; Case T-139/09 *France v Commission* ECLI:EU:T:2012:496, paras 63, 81; Case 173/73 *Italy v Commission* ECLI:EU:C:1974:71, para 16
[99] Case C-382/00 *Greece v Commission* ECLI:EU:C:2004:239, para 52; Joined cases T-267/08 and T-279/08 *Région Nord-Pas-de-Calais and Communauté d'agglomération du Douaisis v Commission* ECLI:EU:T:2011:209, para 109; Case T-243/09 *Fédération de l'organisation économique fruits et légumes (Fedecom) v Commission* ECLI:EU:T:2012:497, para 48; Case T-52/12 *Greece v Commission* ECLI:EU:T:2014:677, para 119; Case T-358/94 *Compagnie Nationale Air France v Commission* ECLI:EU:T:1996:194, paras 62-68. Compare with: Case C-283/03 *A. H. Kuipers v Productschap Zuivel* Opinion of AG Kokott ECLI:EU:C:2004:820, paras 70-73
[100] See for example: Case C-518/13 *Eventech Ltd v The Parking Adjudicator* Opinion of AG Wahl ECLI:EU:C:2014:2239, paras 24-28; *Eventech* (n 88), paras 37-44; Francesco de Cecco, 'Of Vexed Questions and Vexatious Litigation: A Comment on Eventech' (2016) 41 European Law Review 741

criterion, State measures cannot easily avoid State aid control. Arguably, the introduction and application of those fictions bridges the gap between an overly narrow, formalist approach, and an overly wide one, by creating a satisfactory middle ground.

c. Conclusion

In summary, the criterion of State resources as a whole will revolve around the facts of the case at hand. This is obvious with the imputability limb of the notion, as the indicators-based rationale signifies by its very nature the need for case-by-case analysis. Similarly, the burden on State resources limb of the notion will also necessitate a factual analysis, especially in relation to the approaches developed to bridge the gap between the narrow and wide interpretations presented above. In essence, the analysis of notions like effective State control shows the conceptual closeness of the two sub-criteria, especially given the influence of the financing method over an aid measure's imputability. In relation to the burden on State resources sub-criterion, an approach based on a narrow interpretation but devoid of *Sloman Neptun*'s apparent formalism has been developed. It is submitted that this approach is well developed, and well suited to analyse a measure's actual effects, without being so wide as to make the sub-criterion functionally irrelevant.

It is worth noting that purely fiscal cases will satisfy both sub-criteria almost by definition; a piece of fiscal legislation or any other direct fiscal measure will be automatically attributable to the State that introduced it, while the granting of a fiscal advantage means that the State has foregone revenue, effectively placing a burden on its resources. Parafiscal cases on the other hand are slightly more complex, but as detailed above due to their nature they will in most instances satisfy the imputability sub-criterion, and it is likely, due to the often close relationship between such bodies and the State, that the resources financing the parafiscal advantage will be deemed to be under effective State control at some point in their journey to their eventual recipients. This conclusion, obvious as it may be, should be read in light of the debate about the width of the criterion of State resources. Effectively, the wider interpretation of this criterion placed selectivity at the centre of the State aid analysis, arguing that any intervention of the State in the economy which produces an advantage should be examined, in light of a derogation from the general system,[101] as the State resources criterion would be easily satisfied. The inherent logic of the State resources criterion means that this is the situation applicable to fiscal aids; selectivity is quite clearly the main deciding factor,[102] but, as detailed in the relevant Chapter, fiscal selectivity can be satisfied by some general

[101] *Sloman Neptun* Opinion of AG Darmon (n 47), paras 53, 55, 61. In para 61, AG Darmon specifically mentions that the existence of a derogation ensures that truly general measures cannot be caught by selectivity.
[102] Case C-66/14 *Finanzamt Linz v Bundesfinanzgericht, Außenstelle Linz* Opinion of AG Kokott ECLI:EU:C:2015:242, para 114

measures as well, and does not always necessitate a derogation. Based on this, the scope of fiscal State aid is in practice wider than that of non-fiscal or even parafiscal aids, as purely fiscal aids are essentially assessed (solely) on the basis of an increasingly wide criterion of selectivity.

III. Effect on Trade & Distortion of Competition

a. Introduction

As briefly discussed above, and as evidenced by the wording of Article 107(1) TFEU, the two twin criteria of effect on trade and distortion of competition inform the jurisdictional limits of the State aid prohibition.[103] If an aid does not have an effect on trade *or* does not distort competition, then it will be outside the scope of Article 107(1).[104] However, it is not necessary to positively prove that trade has been affected, or that competition has been distorted by the measure in question, but merely to "examine whether that aid is liable to affect such trade and distort competition",[105] which means that the material scope of State aid is not in fact limited in a meaningful way by the existence of those two criteria. This is backed up by the wording of Article 107(1), where aids that "distort or threaten to distort" competition are prohibited "in so far as they affect trade" between Member States. As Soltesz points out, those two criteria are not applied in the same way they are in relation to Article 101(1) TFEU.[106]

b. Effect on Trade and Distortion of Competition in Practice

The CJEU has held that when State aid confers a competitive advantage which strengthens the position of an undertaking compared with other undertakings competing in intra-Union trade, those undertakings must be deemed as being affected by that aid.[107] In such situations, the two criteria will be satisfied, even if a distortion of competition or an effect on trade are merely "likely".[108] The competitive position of an undertaking is the result of numerous factors, and a unilateral modification of any one of those factors will disturb the competitive equilibrium.[109] The two criteria are deeply interlinked, as they can both essentially be satisfied if the competitive position of the recipient undertaking changes as a result of the aid. That improvement distorts the conditions of competition in the

[103] Conor Quigley, *European State Aid Law and Policy* (3rd edn, Hart Publishing 2015), 86
[104] Case 47/69 *France v Commission* ECLI:EU:C:1970:60, para 16
[105] Case C-372/97 *Italy v Commission* ECLI:EU:C:2004:234 para 44; Case 148/04 *Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio Genova 1* ECLI:EU:C:2005:774, para 54
[106] Arhold, Kreuschitz, Säcker, Soltesz, Shuette, Schwab (n 9), paras 455, 489
[107] Case 730/79 *Philip Morris Holland BV v Commission* ECLI:EU:C:1980:209, para 11
[108] *Ibidem*, paras 12-13
[109] *Italy v Commission* (n 98), para 18

given market,[110] and the strengthening of the recipient undertaking as a result of that will affect trade between Member States.[111]

The effect on trade criterion can be satisfied if the recipient of the aid is economically active in other Member States, especially if the market in question is highly competitive.[112] However, this is not a necessary condition for the criterion to be satisfied, as the Court has explained that the mere strengthening of domestic operators has the potential to reduce the opportunities for market penetration.[113] Additionally, an undertaking competing in its domestic market with imported products can, upon receiving aid, affect trade and distort competition.[114] Similarly, it is possible that an undertaking not participating in intra-Union trade may become able to do so as a result of the aid.[115] As a consequence of the wide interpretation of the effect on trade criterion, even aids with a local or regional character and impact can satisfy it.[116] Such a rigid approach can lead to resources being spent on small cases with no economic significance.[117] This results from the fact that the law has to walk a fine line between overreaching and underreaching.[118]

Overall, the two criteria are considered relatively easy to satisfy,[119] as it is sufficient to show that a given measure is *liable* to affect trade or distort competition.[120] This low threshold partly results from the minimal amount of market analysis and definition required.[121] Nonetheless, the circumstances and ways in

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[110] Case C-301/87 *France v Commission* ECLI:EU:C:1990:67, para 50

[111] *Philip Morris* (n 107), para 11

[112] *Spain v Commission* (n 64), para 63; *Italy v Commission* (n 105), para 54; *Greece v Commission* (n 99), paras 71-72; Case C-71/04 *Administración del Estado v Xunta de Galicia* ECLI:EU:C:2005:493, para 42

[113] *Eventech* (n 88), para 70; Joined Cases C-197/11 and C-203/11 *Eric Libert and Others v Gouvernement flaman and All Projects & Developments NV and Others v Vlaamse Regering* ECLI:EU:C:2013:288, para 79; Case C-66/02 *Italy v Commission* ECLI:EU:C:2005:768 para 117; *Unicredito* (n 105), para 58; Joined cases C-393/04 and C-41/05 *Air Liquide Industries Belgium SA v Ville de Seraing and Province de Liège* ECLI:EU:C:2006:403, para 35

[114] *France v Commission* (n 42), para 19

[115] *Italy v Commission* (n 113), para 118

[116] Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* ECLI:EU:C:2003:415, para 82; Case C-172/03 *Wolfgang Heiser v Finanzamt Innsbruck* ECLI:EU:C:2005:130, paras 35, 55-57; Case C-172/03 *Wolfgang Heiser v Finanzamt Innsbruck* Opinion of AG Tizzano ECLI:EU:C:2004:678, para 57

[117] Tim Maxian Rusche, 'General Theory of Compatibility of State Aid' in H Hofmann and C Micheau (eds) *State Aid Law of the European Union* (OUP 2016), 231

[118] Gjermund Mathisen 'What effect on trade? A balancing act in circumscribing the notion of State Aid' (2019) 44 European Law Review 532, 544. See also: Case C-113/00 *Spain v Commission* Opinion of AG Jacobs ECLI:EU:C:2002:50, para 25; Case C-126/01 *Ministère de l'Économie, des Finances et de l'Industrie v GEMO SA* Opinion of AG Jacobs, ECLI:EU:C:2002:273, para 145; Case T-728/17 *Marinvest d.o.o. and Porting d.o.o. v Commission* ECLI:EU:T:2019:325, paras 81-82, 97-101

[119] *Spain v Commission* Opinion of AG Jacobs (n 1), para 33

[120] *Italy v Commission* (n 105), para 44; *Unicredito* (n 105), para 54. Emphasis added.

[121] *Philip Morris* (n 107), para 9; Case C-76/15 *Paul Vervloet and Others v Ministerraad* ECLI:EU:C:2016:975, para 102

which the aid at hand is "capable" of affecting trade and of distorting competition ought to be set out.[122] This is part of the Commission's obligation to state reasons, meaning that some analysis must be undertaken.[123] In other words, the relevant market provides the (limited) context necessary for the admittedly terse analysis required to satisfy the two criteria.[124] Additionally, because of the structure of the State aid monitoring regime, Member States are supposed to notify aid prior to implementing it, meaning that from an *ex ante* perspective it would be functionally impossible to conclusively prove either a potential for competition to be distorted, or that trade is actually affected. In effect, the lack of market definition shows that the Court has embraced an approach more consistent with the analysis of the two criteria in internal market law than competition law.[125] However, this does not mean that free movement law forms, or that it can even form, the basis of analysis of the effect on trade criterion, due to clear definitional asymmetries.[126]

c. Presumptions, Exceptions, and *De Minims*

Despite the relative ease of satisfaction of the effect on trade and distortion of competition criteria discussed in the previous section, over the years, the Courts have established numerous presumptions applicable to the two criteria. First of all, the two criteria will be satisfied if the aid in question is operating, as operating aid is recognised as being the more harmful type of aid when it comes to market impact.[127] This is corroborated by the fact that operating aid is, in principle,[128] outside the scope of the legal exemption provided for by Article 107(3) TFEU.[129] The Court has clarified that this presumption extends to the criterion of distortion of

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[122] Joined cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek BV v Commission* ECLI:EU:C:1985:113, para 24. See also: Joined cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek BV v Commission* Opinion of AG Slynn, ECLI:EU:C:1985:11, 814

[123] Joined cases C-329/93, C-62/95 and C-63/95 *Germany, Hanseatische Industrie-Beteiligungen GmbH and Bremer Vulkan Verbund AG v Commission* ECLI:EU:C:1996:394, paras 51-55; Case T-155/98 *Société internationale de diffusion et d'édition (SIDE) v Commission* ECLI:EU:T:2002:53, paras 70-73

[124] Case 730/79 *Philip Morris Holland BV v Commission* Opinion of AG Capotorti ECLI:EU:C:1980:160, para 4, p 2700. See also: Joined Cases 62/87 and 72/87 *Exécutif Régional Wallon and SA Glaverbel v Commission* ECLI:EU:C:1988:132, paras 14-15, 17; Case T-8/06 *FAB Fernsehen aus Berlin GmbH v Commission* ECLI:EU:T:2009:386, paras 53-55; Case T-369/06 *Holland Malt v Commission* ECLI:EU:T:2009:319, paras 43-44

[125] Juan Jorge Piernas López, *The Concept of State Aid Under EU Law: From Internal Market to Competition and Beyond* (OUP 2015), 189-190

[126] Mathisen (n 118), 537

[127] *France v Commission* (n 110), para 44; Case C-86/89 *Italy v Commission* ECLI:EU:C:1990:373, para 18; Case C-86/89 *Italy v Commission* Opinion of AG Lenz, ECLI:EU:C:1990:309, para 22

[128] Operating aid that meets the criteria of Article 107(3)(a) TFEU will be allowed. See for example: Joined cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato «Venezia vuole vivere», Hotel Cipriani Srl, and Società Italiana per il gas SpA (Italgas) v Commission* ECLI:EU:C:2011:368, para 168.

[129] Case C-278/95 P *Siemens v Commission* ECLI:EU:C:1997:240, para 23; Case C-288/96 *Germany v Commission* ECLI:EU:C:2000:537, para 90

competition.[130] The same presumption has been applied to aids granted to operators active in markets suffering from redundancies[131] or overcapacities,[132] and generally markets in difficulty.[133] It can also be argued that a presumption extends to undertakings operating in close proximity to the borders between two Member States.[134] Additionally, such a presumption can be extended to aid granted in markets that have been liberalised at the Union level,[135] but it appears that the presumption is reversed in non-liberalised markets.[136] Aids whose recipients are mainly multinational groups can also trigger such a presumption.[137]

Most importantly for the purposes of this Chapter, a presumption exists that fiscal aid will distort competition and affect trade.[138] The presumption against operating aid is also relevant to fiscal cases, as the vast majority of fiscal aids are operating in nature.[139] Beyond this, the ECJ has held that the grant of fiscal aid that takes the form of a tax relief must be regarded meeting the effect on trade condition.[140] Arguably, this means that the importance placed on a presumption, such as the one against operating aid, will somewhat differ based on the circumstances under which the aid in question is granted,[141] meaning that fiscal aid is deemed as being particularly damaging to competition and trade. As Farley suggests, the existence and application of so many presumptions showcases that the logic of the two criteria remains "fundamentally legal, rather than economic".[142] In effect, the presumptions mean that the already low burden of proof is lowered

[130] *Germany v Commission* (n 79), para 30; *Germany v Commission* (n 129), paras 78, 85; Case C-288/96 *Germany v Commission* Opinion of AG Cosmas ECLI:EU:C:1999:239, paras 161, 164
[131] *Exécutif Régional Wallon* (n 124), para 13
[132] *Belgium v Commission* (n 2), para 37; Case C-305/89 *Italy v Commission* ECLI:EU:C:1991:142 para 26
[133] *Spain v Commission* (n 2), para 41
[134] Case C-310/99 *Italy v Commission* ECLI:EU:C:2002:143, para 85
[135] *Spain v Commission* (n 64), para 75; *Italy v Commission* (n 113), para 116; *Unicredito* (n 105), para 57; Case C-222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA* ECLI:EU:C:2006:8, para 142; Case C-667/13 *Estado português v Banco Privado Português SA and Massa Insolvente do Banco Privado Português SA* ECLI:EU:C:2015:151, para 51
[136] Joined cases C-15/98 and C-105/99 *Italy and Sardegna Lines - Servizi Marittimi della Sardegna SpA v Commission* ECLI:EU:C:2000:570, para 59; Joined cases C-15/98 and C-105/99 *Italy and Sardegna Lines - Servizi Marittimi della Sardegna SpA v Commission* Opinion of AG Fennelly ECLI:EU:C:2000:203, para 42
[137] *Forum 187* (n 88), para 134
[138] Case C-88/03 *Portugal v Commission* ECLI:EU:C:2006:511, para 91; Case C-496/06 P *Commission v Italy and Wam SpA* ECLI:EU:C:2009:272, para 51
[139] Jaeger, 'Tax Measures' (n 23), para 93
[140] *Wam* (n 138), para 51
[141] Martin Farley, 'The Role of Economics-based Approaches when Analysing Effects on Trade and Distortions of Competition after Wam' (2010) 9 European State Aid Law Quarterly 369, 374
[142] *Ibidem*, 373

even further when it comes to fiscal aid, with the Commission merely needing to prove the existence of aid which satisfies them.[143]

The 2016 Notice contains some minor exceptions to the wide interpretation of the two criteria, focusing on the distortion of competition caused by legal monopolies, and the potentially "marginal effect" on trade of aid aimed at undertaking providing goods or services in a limited (and local) area.[144] However, those exceptions are limited by their specificity.[145] Additionally, a concept of *de minimis* aid has been introduced.[146] Essentially, this notion means that certain aid fails to meet all the criteria of Article 107(1).[147] The criteria that are not met in this case are clearly effect on trade and distortion of competition, as the amount of the aid cannot possibly have any bearing in relation to the other three criteria – a selective advantage granted through State resources maintains that character regardless of the actual sum granted. The Court accepted this new introduction, and has confirmed that *de minims* aid is excluded from the concept of aid.[148] However, despite the introduction of *de minimis* as a concept, for aid outside its scope, the wide, catch-all interpretation of the criteria of effect on trade and distortion of competition remains, as the threshold exists only by virtue of the *de minimis* rules.[149] The notion of *de minimis* is of limited use in fiscal cases, as under Article 4(1) of Regulation 1407/2013, only transparent aid can benefit from the exemption. In this context, transparent aid means aid where it is possible to calculate the gross amount of the aid *ex ante*,[150] which can become difficult in fiscal cases. Fiscal measures usually do not grant aid directly in cash but take a form that makes the exact amount of the grant depend on the recipients' turnover or actions,

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[143] *Germany v Commission* (n 129), para 85; *Heiser* (n 116), para 55; *Wam* (n 138), para 54; Case T-55/99 *Confederación Española de Transporte de Mercancías (CETM) v Commission* ECLI:EU:T:2000:223, para 83; *Germany v Commission* Opinion of AG Cosmas (n 130), paras 148-149

[144] 2016 Notice (n 3), paras 188, 196. See also, for the application of the "marginal effect" test: *Marinvest* (n 118), paras 81-82, 97-101

[145] Erika Szyszczak, 'Distortion of Competition and Effect on Trade between EU Member States' in H Hofmann and C Micheau (eds) *State Aid Law of the European Union* (OUP 2016), 158

[146] Commission Notice on the *de minimis* rule for State Aid [1996] OJ C 68/9; Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid [2013] OJ L 352/1, which replaced Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid [2006] OJ L 379/5

[147] Commission Regulation (EU) No 1407/2013 (n 146), Article 3(1)

[148] Case C-351/98 *Spain v Commission* ECLI:EU:C:2002:530, para 51; *Libert* (n 113), para 81

[149] *Xunta de Galicia* (n 112), para 41; *Eventech* (n 88), paras 68-69; *Vervloet* (n 121), paras 102-105; C-71/04 *Administración del Estado v Xunta de Galicia* Opinion of AG Jacobs ECLI:EU:C:2005:326, para 26; *Eventech* Opinion of AG Wahl (n 100), paras 86-87; Case C-76/15 *Paul Vervloet and Others v Ministerraad* Opinion of AG Kokott ECLI:EU:C:2016:386, paras 92-94

[150] It is worth noting that in the context of Article 4 (d) of the Block Exemption Regulation (Commission Regulation (EU) No 651/2014, as amended by Commission Regulation (EU) 2017/1084) tax aids can be transparent, but only if there is a cap in place to ensure that the relevant thresholds set out in Article 3 of the Regulation are not exceeded.

meaning that the aid will not be transparent, and therefore not exemptible. Outside the safe harbour of *de minimis* exemption, the operating and fiscal nature of fiscal aid creates a presumption that means that even if the aid granted is below the *de minimis* threshold, trade will be affected and competition distorted for the purposes of Article 107(1).

In summary, it is clear that the effect on trade and distortion of competition criteria are generally easy to satisfy. This is especially true in relation to fiscal aid, which falls into two of the presumptions developed by the Court. In effect, this means that in fiscal cases the two criteria are almost automatically satisfied. Those presumptions reduce the Commission's obligation to State reasons to the bare minimum of establishing that the measure in question actually meets one of those presumptions, without needing to further analyse the two criteria. At the same time, those presumptions create particular problems for fiscal measures, as most fiscal aid will be operating, and thus presumed to affect trade and distort competition.

d. Conclusion

In conclusion, the criteria of effect on trade and distortion of competition are conceptually very closely linked, and this carries into their application. In order to satisfy the distortion of competition criterion what matters is whether the aid is likely to strengthen the competitive position of the recipient vis-à-vis its competitors.[151] At the same time, it is clear from the case-law of the Court that when aid strengthens the position of an undertaking in relation to other undertakings competing in intra-Union trade, that aid affects trade between Member States for the purposes of Article 107(1).[152] In essence, if one criterion is satisfied, so will be the other. The extent of the Commission's analysis of those two criteria will greatly depend on several presumptions that have developed through the case law, while *de minimis* aid exists in practice, but not necessarily in theory. Most fiscal aid, due to its nature and administration, will almost certainly fall within one of the presumptions established by the Courts, while at the same time not necessarily being able to benefit from *de minimis* exemption. The satisfaction of the criteria of effect on trade and distortion of competition is generally straightforward,[153] but this is even more pronounced in fiscal cases.

IV. Conclusion

This Chapter has looked at three of the five cumulative criteria of State aid, focusing on how they apply to fiscal cases, and how that application differs from their application to non-fiscal cases. The criterion of State resources, with two sub-criteria contained within it, can be particularly complex at times, but given its

[151] *France v Commission* (n 110), para 50
[152] *Philip Morris* (n 107), para 11
[153] *Spain v Commission* Opinion of AG Jacobs (n 1), para 33

internal logic, in principle, fiscal State aid will satisfy it very easily. Beyond this, the treatment of foregone revenues or revenues not collected as State resources also points to its limited relevance in fiscal cases. However, the non-creation of new revenue, or lost revenue not closely linked to an advantage, do not fall within the scope of the criterion. In relation to the application of the criteria of effect on trade and distortion of competition, the various presumptions and formulae used by the Courts and the Commission mean that the evidential burden is often significantly lowered. This makes the application of the two criteria very straight forward in (almost) all State aid cases, showing that they are in principle and in general easy to satisfy. However, this is especially true of fiscal aid and operating aid, which are caught by these presumptions, meaning that fiscal measures will be presumed to meet those two criteria.

It is therefore clear from the analysis in this Chapter that not all the criteria of Article 107(1) TFEU are created equal. In relation to the effect on trade and distortion of competition criteria, fiscal measures are particularly affected by the presumptions developed in the case law, some of which specifically target tax schemes or tax measures. Thus, under the current conceptual framework applicable to the two criteria, fiscal State aid will in most circumstances be presumed to satisfy them for the purposes of Article 107(1), while being unable to benefit from the more useful limitations of the scope of the criteria. This is highly unfortunate, as it has been shown that the mere logic of the State resources criterion suggests that purely fiscal cases will, almost by definition, satisfy it. This is in line with the purpose and logic of the criterion, as any fiscal measure will result from legislation, and thus be by definition imputable to the State,[154] even if an indicators-based approach is used. At the same time, the flexibility with which the second limb of the criterion, namely placing a burden on State resources, has been applied means that foregone revenue, for example in the form of a tax exemption, will be deemed to be such a burden.[155] In other words, the internal logic of the State resources criterion clashes with the concept of taxation, making its application functionally limited in relation to fiscal cases. It is a criterion that, despite having a significant influence on the scope of aid, cannot be fruitfully applied to fiscal cases. Thus, the two quasi-jurisdictional criteria presume that fiscal aid satisfies them, while the logic and application of the State resources criterion means it plays no part in defining the scope of fiscal aid. In brief, this Chapter has shown that the three criteria discussed, despite their potential intricacies, will be very easily, if not automatically, satisfied in the vast majority of fiscal cases.

What becomes apparent from the foregoing is that the existence fiscal aid is significantly easier to prove when compared to non-fiscal or even parafiscal aid. This

[154] *Vent De Colère!* (n 8), para 17
[155] *NOx* (n 83), para 104

results from the rigid formulae and presumptions employed by the CJEU in its analysis of the criteria of effect on trade and distortion of competition, and from the internal logic and structure of the State resources criterion. Thus, the analysis of a fiscal measure will hinge on the selectivity of the measure, as well as the existence of an advantage. This conclusion is however somewhat worrying, as the notion of fiscal selectivity has been stretched by recent trends in the case law, documented and analysed in the Selectivity Chapter. In effect, the constituent elements of the fiscal selectivity analysis have been defined and applied in an increasingly wide manner. At the same time, the notion of fiscal advantage is, in general, subject to an analysis that is eerily similar to the one employed for the notion of selectivity. In cases of individual fiscal aid, the ECJ has accepted that if an advantage exists, then selectivity can be (rebuttably) presumed.[156] The notion of advantage, as discussed in the relevant Chapter, gains relevance in fiscal cases due to the burden and standard of proof attached to it, rather its conceptual structure or limits. This all underscores the importance of selectivity as *the* criterion of fiscal aid, since "the other conditions laid down in Article 107(1) TFEU are almost always satisfied", as observed by AG Kokott.[157] In effect, the consistent widening of the notion of fiscal selectivity becomes particularly worrying, given that the (partially) scope-defining purpose of the State resources criterion cannot be fulfilled in fiscal cases and that the notion of advantage does not contain any theoretical limitations to the scope of fiscal aid. This is because the scope of the entirety of fiscal aid becomes dependent on the scope of selectivity, with no other potential limitations, and with the quasi-jurisdictional criteria of effect on trade and distortion of competition being automatically satisfied. Thus, the existence of fiscal aid is not only easier to prove, but the very scope of fiscal aid is wider than that of non-fiscal aid. This exceedingly wide scope of selectivity and therefore fiscal aid must also be placed in the context of the significant hurdles and limited possibilities for such aid to be deemed compatible with the internal market. On the one hand, this conclusion demonstrates that the constituent elements of the notion of aid as well the compatibility regime struggle with fiscal cases, which results in fiscal aid being different from non-fiscal aid and having a wider scope. On the other hand, the effect of the wider, and widening, scope of fiscal aid, especially in the context of the limitations of the compatibility regime, is a limitation of Member States' fiscal sovereignty and their ability to pursue policy objectives through their tax systems. In summary, Part I has shown that the system applicable to fiscal aid is problematic, due to the very wide scope of the notion of fiscal aid. This results from the increasing width of the notion of selectivity, when read in conjunction with the fact that due to the inherent logical

[156] Case C-15/14 *Commission v MOL Magyar Olaj- és Gázipari Nyrt* ECLI:EU:C:2015:362 para 60
[157] *Finanzamt Linz* Opinion of AG Kokott (n 102), para 114

limitations of the State resources criterion and the nature of taxation selectivity is the only determining factor of the scope of fiscal aid.

Part II

This Part primarily examines the Commission's tax ruling State aid Decisions. It begins with a brief analysis of the fiscal context in which the Decisions were adopted, examining tax rulings, hybrid mismatches, and the arm's length principle (ALP) on which the analysis focuses. It is shown that the application of the ALP is extremely complex, relies on numerous case-specific elements, and is by definition approximate.

This Part moves on to critically discuss the Decisions and the Court's response to them, where available at the time of writing. The analysis of the tax ruling Decisions clearly shows that the reasoning employed is highly problematic. However, even the novel problems, such as the invention of an EU ALP, can to an extent be traced back to the problems analysed in Part I, especially in relation to the width of the notion of selectivity. Thus, the tax ruling Decisions on the one hand present a new threat to fiscal sovereignty in the form of a supranational fiscal principle being inferred into primary Union law, while at the same time serving as cautionary tales about the potential dangers and problems lurking in the shadows of an excessively wide concept of fiscal aid.

Tax Rulings, the Arm's Length Principle, and the Commission's Decisions

I. Introduction

This thesis has thus far analysed the notion of fiscal State aid. Through the discussion in the previous Chapters, it becomes clear that the application of the criteria of aid to fiscal cases differs from their application to non-fiscal ones, as a result of the peculiarities of taxation and of the inherent logic of certain criteria. This difference in application in effect ends up placing a significant weight on the selectivity analysis. However, the notion of fiscal selectivity was shown to have been significantly widened, in practice meaning that the scope of fiscal aid has itself been widened. Thus, this thesis has already demonstrated the widening of the notion of fiscal aid. This development should be considered in the context of the compatibility regime, whose application was shown to be somewhat narrower when it comes to fiscal cases. In practical terms therefore, it is somewhat easier to prove the aid character of a fiscal measure, while it is harder for such a measure to be deemed compatible. In the context of the findings of the analysis already undertaken in this thesis, it becomes necessary to examine a series of recent Commission Decisions looking into tax rulings granted by Member States to (primarily) MNEs under the lens of State aid law. Those Decisions, which were in effect launched in 2014 under Commissioner Almunia, who described the tax rulings as "sweetheart tax deals", were geared towards utilising State aid law to examine tax law frameworks and administrative practices as they pertained to the taxation of MNEs – in other words, the policy implications and background of the Decisions was clear.[1] The Decisions focused on large MNEs, such as Apple or Amazon, and a number of investigations into companies like Nike and IKEA are still ongoing. The Decisions however were not particularly well-received, and contained questionable elements in their reasoning. The rationale of the Decisions and its problematic elements will be discussed in detail in the following Chapter. However, before moving to that analysis, it is important to contextualise the Decisions, in order to allow for a complete and thorough discussion of their content.

This Chapter will provide the necessary context for the discussion of the Commission's recent fiscal State aid Decisions examining tax rulings. Those Decisions deal with highly complex fiscal arrangements and revolve around well-established but still heavily debated fiscal practices. First, this Chapter will briefly set out the international taxation context surrounding those Decisions. It will look at tax rulings, hybrid mismatches, Transfer Pricing (TP), and the arm's length principle

[1] Commissioner Almunia, Speech 'Fighting for the Single Market', European Competition Forum, Brussels, 11 February 2014; Commissioner Almunia, Speech 'Trends and Milestones in Competition Policy Since 2010', EU's 31st annual Competition Policy Conference, Brussels, 14 October 2014

(ALP), and explain how those elements of the international tax regime operate. Then, this Chapter will briefly outline the factual patterns and reasoning of the tax ruling Decisions. This contextualisation of the discussion is particularly useful, as the international tax environment, the nature of the ALP, and the reasoning of the Decisions inform the critique of the Decisions and the implications of their rationale. Thus, in order to analyse the content of the tax ruling Decisions, we must first consider their context.

II. Tax Rulings

a. Tax Rulings in General

As a term, "tax rulings" can conjure some negative connotations, especially when qualified by the adjective "sweetheart". However, in principle, tax rulings are merely requests from taxpayers to national tax authorities to issue rulings concerning the application of domestic tax legislation to specific corporate structures and transactions,[2] and can be seen as an example of taxpayers and fiscal authorities working together.[3] "Tax rulings" is an umbrella term, covering several types of arrangements between tax authorities and taxpayers,[4] and they can take many forms as they are based on the tax systems of individual Member States.[5] Essentially, tax rulings, create legal certainty,[6] and can reduce double taxation.[7] Beyond this, they are also particularly useful in the application of the arm's length principle.[8] Additionally, as tax rulings can lead to a better working relationship between tax authorities and taxpayers, it has been suggested that they can increase compliance by making the tax administration more transparent.[9] As such, tax rulings are not seen as inherently problematic, despite the fact that, as a practice, they can be ripe for abuse, and can confer competitive advantages to recipients.[10]

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[2] See for example: Commission, Technical Analysis of focus and scope of the legal proposal – Accompanying the document "Proposal for a Council Directive amending Directive 2011/16/EU as regards the exchange of information in the field of taxation {COM(2015) 135 final}, Staff Working Document, SWD(2015) 60 final, 5

[3] Elly Van de Velde, *'Tax Rulings' in the EU Member States* (Directorate General for Internal Policies Policy Department A: Economic and Scientific Policy, Study prepared for the European Parliament's ECON Committee IP/A/ECON/2015, 2015), 8

[4] *Ibidem*, 26-28

[5] For a brief analysis see *Ibidem*, 28-33

[6] *Ibidem*, 9

[7] Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the field of dispute avoidance and resolution procedures and on Guidelines for Advance Pricing Agreements within the EU, (EU APA Guidelines), COM (2007/0071 final), points 4-6

[8] Romero J S Tavares, Bret N Bogenschneider, and Marta Pankiv, 'The Intersection of EU State Aid and U.S. tax Deferral: A Spectacle of Fireworks, Smoke, and Mirrors' (2016) 19 Florida Tax Review 121, 176-177

[9] A Barilari, *Le Consentement à l'Impôt* (Presses de Sciences Po 2000), 94-95

[10] OECD, *Harmful Tax Competition: An emerging global issue*, (OECD 1998), 28-29, 34, 54; Commission (n 2) 6

In the context of the EU, tax rulings need to be issued in line with EU law and policy.[11] There is a framework for the exchange of information,[12] and the Joint Transfer Pricing Forum, under the auspices of the Commission, has produced a Communication relating to advanced pricing agreements (APAs),[13] attempting to establish a set of "best practices",[14] as a supplement to the Arbitration Convention.[15] The Code of Conduct as well as the Code of Conduct Group, have also been somewhat involved with tax rulings, but they have not produced general guidance, only attempting to rectify specific problems in specific countries.[16]

APAs are essentially akin to a dispute resolution mechanism between MNEs and tax authorities, which carries with it the benefits of tax rulings discussed above.[17] As they can reduce compliance costs and risks, APAs have become increasingly popular tools for MNEs.[18] The JTPF Guidelines recognise that an APA does not have to include all transactions between all entities in a given group, but only those the taxpayer applies for.[19] Importantly, it is suggested in the Guidelines that the potential situations covered by an APA should be as wide as feasible, and the critical assumptions should be tailor-made, based on the individual taxpayer's situation.[20] The rationale behind that is that otherwise the APA will simply provide certainty for one specific situation, meaning that certainty would overall be jeopardised.[21] Thus, it is clear that there is no concrete set of rules or guidance at the Union level dealing with tax rulings in general or APAs specifically, and the ruling regime's administration.

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[11] Van de Velde (n 3), 16

[12] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L64/1, as amended by Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation [2015] OJ L 332/1, Article 8a

[13] APAs are tax rulings specifically dealing with transactions between related enterprises.

[14] Commission (n 7), points 13-15, Annex

[15] 90/436/EEC, Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises - Final Act - Joint Declarations - Unilateral Declarations [1990] OJ L 225/10. The Arbitration Convention aims to eliminate double taxation in relation to adjusted profits of associated enterprises, by providing for a framework for contracting states to eliminate such instances of double taxation. The Convention only sets minimum standards, and is not EU law. As a result, this means that it lacks primacy over domestic tax law, and that the CJEU has no jurisdiction over its interpretation. See also: Georg Kofler, 'Tax Disputes and the EU Arbitration Convention' in Eduardo Baistrocchi (ed) *A Global Analysis of Tax Treaty Disputes* (Cambridge University Press 2017), Parts 1, 2.1

[16] Van de Velde (n 3), 18-22; Commission (n 3), 8-9

[17] Lorraine Eden and William H Byrnes, 'Transfer Pricing and State Aid: The Unintended Consequences of Advance Pricing Agreements' (2018) 25 Transnational Corporations Journal 9, 10, 14

[18] Lorraine Eden, *Taxing Multinationals: Transfer Pricing and Corporate Income Taxation in North America* (University of Toronto Press 1998), 469-476

[19] Commission (n 7), Annex, point 48

[20] *Ibidem*, Annex, points 54-56

[21] *Ibidem*

b. Tax Rulings and State aid Law

Tax rulings, especially those relating to issues such as TP, can create problems when examined through the lens of State aid law. In an attempt to provide guidance via a working paper, the Commission merely states that tax rulings do not raise issues under State aid law, "provided they do not grant a selective advantage".[22] However, as pointed out by Nicolaides, this statement is more tautological than explanatory;[23] any measure that is not selective or does not confer an advantage would be absolutely legal under the State aid regime.[24]

As Gunn and Luts explain, a tax ruling can in principle give rise to aid in two distinct scenarios: when the underlying legislation which the ruling interprets is problematic from an aid perspective, or when a sound underlying fiscal regime is interpreted by the tax authorities in an unsound manner.[25] In the first scenario, the ruling is simply an interpretation of "bad" law, and therefore not *per se* the problem – the underlying law is.[26] In the latter scenario however, more questions can arise. A tax ruling will create an advantage if the taxpayer's liability is reduced when compared to a hypothetical counterfactual in which no such ruling exists. In relation to the notion of advantage, and bearing in mind the standard of proof required, this means that an advantage needs to be positively proven,[27] otherwise the erstwhile recipient is not actually better off, for the purposes of State aid law. In this context, it is clear that a tax ruling does not necessarily or automatically lead to an overall reduction of an undertaking's tax liability when compared to the actual application of the ordinary tax system.[28] In other words, bearing in mind the complexities inherent in applying any ordinary fiscal regime to a large integrated group, for a tax ruling to actually confer an advantage, the ruling must place the recipient in a better position when compared to the application of the ordinary regime, *not* in comparison to the statutory rate – the fiscal context must be taken into account. This would meet the standard of proof requiring an advantage to be actually proven. This difficulty is compounded by the margins of appreciation necessary in the

[22] DG Competition, 'Internal Working Paper – Background to the High Level Forum on State Aid of 3 June 2016' [2016], point 5
[23] Phedon Nicolaides, 'State Aid Rules and Tax Rulings' (2016) 15 European State Aid Law Quarterly 416, 423
[24] Joined Cases C-278/92, C-279/92, and C-280/92 *Spain v Commission* ECLI:EU:C:1994:325, para 20
[25] Anna Gunn, and Joris Luts, 'Tax Rulings, APAs and State Aid: Legal Issues' [2015] EC Tax Review 119, 120
[26] See also: Commission Decision 2019/700/EU of 19 December 2018 on the State Aid SA.34914 (2013/C) implemented by the United Kingdom as regards the Gibraltar Corporate Income Tax Regime [2019] OJ L 119/151, recital 144
[27] Case T-865/16 *Fútbol Club Barcelona v Commission* ECLI:EU:T:2019:113, paras 58-67. See also: Begona Perez Bernabeu, 'How to Determine the Existence of a Tax Advantage: The F.C. Barcelona Case' (2019) 18 European State Aid Law Quarterly 377, 377-380
[28] Nicolaides (n 23), 424

modern fiscal environment,[29] and the limitations of TP methodology which will be discussed below.

Selectivity also poses problems in the context of tax rulings. In relation to an advantageous tax ruling it is important to determine whether such a ruling results from the normal, non-selective application of the tax ruling regime.[30] In the context of APAs for example, given the acceptance and prevalence of wide ALP ranges,[31] it is possible that a taxpayer who agreed to an APA granted in line with the national tax system and in line with internationally accepted ALP practices would in effect be better off than in the absence of that APA, simply as a result of the application of the ALP rules. A regime allowing for APAs and setting out how transfer prices are to be calculated could confer an advantage, but it would do so through the application of objective criteria, with uncertainties stemming from the nature of the ALP, as opposed to being selectively granted by the State.

It is also worth noting that problems relating to the reference framework can arise, as it is unlikely that the reference framework could exclude the tax ruling regime.[32] If the tax ruling regime in and of itself is taken to be the reference framework, the undertakings that have not sought to obtain a tax ruling would not be comparable to those that did,[33] meaning that selectivity would have to be assessed on the basis of inherently individual tax rulings. If alternatively the reference framework is taken to be the ordinary tax system combined with the tax ruling regime, then only group companies would be in a comparable legal and factual situation, as they would be the only ones subject to the tax ruling regime.[34] Thus, the application of the ruling regime becomes the focal point of the selectivity comparability analysis. A further problem would be that tax rulings are available to all taxpayers who may be inclined to seek one – meaning that if tax rulings systematically deviate from the national tax rules, they are not actually selective, as the advantage stemming from the rulings would be open to all undertakings in a comparable situation.[35] In brief, the selectivity of a tax ruling is neither automatic nor a given.

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[29] Gunn and Luts (n 25), 120

[30] Raymond Luja, 'State Aid Benchmarking and Tax Rulings: Can We Keep It Simple' in I Richelle, W Schön, E Traversa (eds) *State Aid Law and Business Taxation* (Springer 2016) 111, 118-119. See also: Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, para 103

[31] This will be further discussed below. See indicatively: OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (OECD 2010), paras 3.55-3.62

[32] Nicolaides (n 23), p. 424-425. See also: Case C-203/16 P *Dirk Andres (faillite Heitkamp BauHolding) v Commission* ECLI:EU:C:2018:505, paras 102-107

[33] Gunn and Luts (n 25), 122

[34] Nicolaides (n 23), 425

[35] Gunn and Luts (n 25), 122

In summary, any arrangement between taxpayers and tax authorities is a tax ruling. Despite the multiple benefits they can offer if deployed properly, they can easily be abused. It is also clear that as they are mere expressions of the Member States' tax systems, they cannot be harmonised – only guidance can be provided at a systemic level by the Union. In terms of State aid law, it is clear that they can give rise to measures that can be qualified as aid, but despite their apparent simplicity, they can be highly problematic in relation to the selectivity and advantage criteria, especially given that in practical terms such rulings will only be sought when the application of national rules is far from obvious, meaning that it becomes very hard to examine whether the tax ruling actually interprets the law, or whether it deviates, and to what extent, from it.[36] The evidential burden attached to the notion of advantage, as well as the (correct) definition of the reference framework and subsequently the delimitation of the comparable situation for the purposes of selectivity, can be particularly tricky in the context of tax rulings and tax ruling regimes.

III. Hybrid Mismatches

Another fiscal issue that plays a role in the Commission's recent Decisions is hybrid mismatches. Hybrid mismatches are in principle easy to understand, but at the same time are immensely complicated in practice. Simply put, hybrid mismatches are arrangements which are treated differently for tax purposes by two or more jurisdictions.[37] Such arrangements can take multiple forms, such as hybrid entities,[38] dual residence entities,[39] hybrid instruments,[40] and hybrid transfers.[41] Such arrangements are not *per se* illegal, and often simply reflect the differences in the legal regime of the jurisdictions involved, which is a reasonable outcome given the lack of harmonisation and coordination between multiple tax regimes.[42] However, hybrid mismatch arrangements can be used to exploit that differential treatment, and obtain fiscally beneficial outcomes.[43] As such, they have made their way on the Commission's and the OECD's "naughty list".[44]

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[36] *Ibidem*, 121

[37] Maria S Domingo, 'Hybrid Mismatch.com: Neutralizing the Tax Effects of Hybrid Mismatch Arrangements' (2019) 38 North East Journal of Legal Studies 1, 6-17

[38] Leopoldo Parada, 'Hybrid Entity Mismatches and the International Trend of Matching Tax Outcomes: A Critical Approach' (2018) 46 INTERTAX 971, 972

[39] OECD, *Neutralising the Effects of Hybrid Mismatch Arrangements – Action 2: 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project* (OECD 2015), 12

[40] OECD, *Hybrid Mismatch Arrangements: Tax Policy and Compliance Issues* (OECD 2012), 7; Domingo (n 37) 9

[41] OECD (n 39), 26

[42] Parada (n 38), 973

[43] Domingo (n 37), 7. See also: Commissioner Almunia, 'Fighting for the Single Market' (n 1).

[44] Peter J Wattel, 'Forum: Interaction of State Aid, Free Movement, Policy Competition and Abuse Control in Direct Tax Matters' [2013] World Tax Journal 128, 142

Through the exploitation of systemic mismatches, taxpayers can be granted a deduction in one country while avoiding the corresponding inclusion in their tax base in another country (D/NI).[45] Furthermore, double deductions (DD) can be achieved,[46] and multiple foreign tax credits can be generated out of a single payment of foreign tax.[47] It is clear that the abusive potential of hybrid mismatches is huge,[48] but at the same time they can simply result from the natural interaction of different legal and fiscal systems.[49] They are clearly two-country problems, necessitating a solution through positive harmonisation.[50] Bad as double non-taxation may be, it is not (necessarily) discriminatory or selective, very much like double taxation is not – both result from disparities stemming from the exercise in parallel of taxing powers.[51] Both are two-country problems, incapable of occurring within a single jurisdiction, as there would be no disparity to suffer or mismatch to exploit. This makes their classification as State aid difficult.

IV. Transfer Pricing and the Arm's Length Principle

a. The ALP

The ALP is an essential tool to avoid TP misapplication situations. TP is one of the most important issues in international taxation and has been described as the lynchpin around which all the maladies of international taxation exist.[52] TP occurs whenever two companies that are part of the same group trade with each other. Essentially, TP rules aim to ensure a fair allocation of the tax base,[53] by ensuring that the prices charged reflect reality. As such, TP rules apply primarily to international transactions. It is worth noting that TP is not illegal, it is in fact in most cases a fact of life, something with which MNEs and integrated firms in general have to deal on a regular basis. TP in general serves an important purpose in an increasingly complex and interconnected global economy,[54] especially if the extent of intrafirm trading is

[45] OECD (n 40), 7
[46] Domingo (n 37), 7-8
[47] OECD (n 39), 11
[48] OECD (n 40), 11
[49] Parada (n 38), 973. See also: John Vella, *Nominal vs. Effective Corporate Tax Rates Applied by MNEs and an Overview of Aggressive Tax Planning Tools, Instruments and Methods* (Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy, Report prepared for the European Parliament's TAXE Special Committee IP/A/TAXE/2015-07 2015), 15
[50] Wattel, 'Forum' (n 44), 142
[51] Peter J Wattel, 'Stateless Income, State Aid and the (Which?) Arm's Length Principle' (2016) 44 INTERTAX 791, 797
[52] Lee A Sheppard, 'News Analysis: Is Transfer Pricing Worth Salvaging?' [2012] Tax Analysts Tax Notes International 467
[53] Violeta Ruiz Almendral, 'Tax Avoidance, the "Balanced Allocation of Taxing Powers" and the Arm's Length Standard' in I Richelle, W Schön, E Traversa (eds) *Allocating Taxing Powers within the European Union* (Springer 2013), 149
[54] Richard Sansing, 'International Transfer Pricing' (2014) 9 Foundations and Trends® in Accounting 1, 2

taken into consideration.[55] However, it is a practice ripe for abuse.[56] As such TP rules have an anti-avoidance function, even if that is not their primary purpose.[57] It is however worth noting that estimates of avoidance are likely overstated by a wide margin, as they do not take into consideration certain features of the tax systems under examination.[58] It has for example been suggested, based on empirical data, that even though MNEs use TP to minimise their tax exposure, they tend to prefer "reasonable" transfer prices to avoid potential penalties.[59]

The authoritative statement of the ALP can be found in Article 9(1) of the OECD Model Tax Convention, while further analysis on the specifics of it can be found in the OECD TP Guidelines for Multinational Enterprises and Tax Administrations.[60] The ALP dictates that the amount charged by one related party to another for a given product must be the same as if the parties were not related and were acting in their own best interests. In practice, this can be seen as a double allocation – the allocation of profits to members of an integrated group, and by extension, if that group is multinational, the allocation of taxable income to States.[61] The notion of the ALP is based on the price two unrelated parties would agree upon through bargaining in the market,[62] meaning that there is a multitude of factors that need to be taken into consideration. This is far from being an exact science, and this can make the application of the ALP problematic.

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[55] Jinyan Li, 'Soft Law, Hard Realities and Pragmatic Suggestions: Critiquing the OECD Transfer Pricing Guidelines' in Wolfgang Schön and Kai A Konrad (eds) *Fundamentals of International Transfer Pricing in Law and Economics* (Springer 2012), 81; Theresa Lohse, Nadine Riedel, and Christoph Spengel, 'The Increasing Importance of Transfer Pricing Regulations – a Worldwide Overview' (2012) Oxford University Centre for Business Taxation Working Paper 12/27, 2, 4

[56] This can be evidenced by the fact that three BEPS Actions (8-10) were dedicated to Transfer Pricing. See: OECD, *OECD/G20 BEPS Project: Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10 - 2015 Final Reports* (OECD, 2015)

[57] Ruiz Almendral (n 53), 149, 160

[58] Vella (n 49), 24

[59] Hagen Luckhaupt, Michael Overesch, and Ulrich Schreiber, 'The OECD Approach to Transfer Pricing: A Critical Assessment and Proposal' in Wolfgang Schön and Kai A Konrad (eds) *Fundamentals of International Transfer Pricing in Law and Economics* (Springer 2012), 97

[60] OECD, *Model Tax Convention on Income and on Capital* (OECD 2017), Article 9; OECD, *Model Tax Convention on Income and on Capital* (OECD 2014), Article 9; OECD, *Model Tax Convention on Income and on Capital* (OECD 2010), Article 9; OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (OECD 2010). It is worth noting that there are more recent versions of the Guidelines, dating from 2017, but the Commission has based its analysis of the State Aid cases on the 2010 version, meaning that those Guidelines are more relevant in the discussion of its Decisions. See to that effect: Saturnina Moreno Gonzalez, 'State Aid and Tax Competition: Comments on the European Commission's Decisions on Transfer Pricing Rulings' (2016) 15 European State Aid Law Quarterly 556, 570.

[61] Wolfgang Schön, 'Transfer Pricing, the Arm's Length Standard and European Union Law' in I Richelle, W Schön, E Traversa (eds) *Allocating Taxing Powers within the European Union* (Springer 2013), 80, 89. It should however be noted that the ALP does not allocate taxing rights to a State – it rather protects the application of those taxing rights.

[62] Eden (n 18), 602

The Guidelines are a soft law instrument and thus not binding unless enacted into national law, but can still be highly influential.[63] The OECD Convention, and the Guidelines, have not been put into application by all EU Member States, and those that draw from those Guidelines do not do so in a uniform manner,[64] and are under no obligation to do so. Since the Guidelines can only take effect via their incorporation into national law, it is natural that even when those Guidelines and the ALP are fully accepted, there will be actual divergences in their application, and in the content of the relevant national laws.[65] This follows from the general lack of direct tax harmonisation, and can also be evidenced by the content of the JTPF's APA Guidelines.

b. The Problems with the ALP

Despite its prevalence, the ALP is not a perfect tool. Importantly, the OECD Guidelines specify that TP and the calculation of the ALP is not an "exact science".[66] This is reasonable, given that operating within a group yields positive economic results,[67] meaning that the foundational hypothetical of the ALP, namely at what price would the related parties have agreed upon had they been unrelated, cannot have an absolutely correct answer.[68] Groups tend, from an economic perspective, to have higher profits and face lower risks when compared to standalones, thus affecting prices in controlled transactions.[69] This is compounded, as those positive economic effects are, by definition, available *only* within a group.[70] This becomes a problem, as the very idea of comparability, which sits at the centre of the ALP, does not take into consideration the nature of a MNE.[71] The commercial rationality of a decision of an integrated firm engaging in intrafirm transactions is not the same of that of an independent firm.[72] For example, the ALP struggles with taking into consideration economies of scale,[73] or network and synergy effects which exist solely as a result of the group's functions.[74] In practice, the members of a group structured on hierarchies can (and often do) have monopsonistic or monopolistic relations between one another. Additionally, integrated firms tend to operate as a

[63] Li (n 55), 78, 84
[64] Schön, 'Transfer Pricing' (n 61), 81-82. See also, for example: OECD, 'Transfer Pricing Country Profile – Ireland' <https://www.oecd.org/ctp/transfer-pricing/transfer-pricing-country-profile-ireland.pdf> accessed on 03/09/2020 and OECD, 'Transfer Pricing Country Profile – Italy' <https://www.oecd.org/ctp/transfer-pricing/transfer-pricing-country-profile-italy.pdf> accessed on 03/09/2020
[65] Li (n 55), 84
[66] OECD (n 60), paras 1.13, 3.55
[67] See for example: Ronald H Coase, 'The Nature of the Firm' (1937) 16 Economica 386, 390-393
[68] Eden (n 18), 593
[69] Nicolaides (n 23), 422
[70] Wattel, 'Stateless Income' (n 51), 796
[71] Luckhaupt, Overesch, and Schreiber (n 59), 100
[72] Schön 'Transfer Pricing' (n 61), 96
[73] Lohse, Riedel, and Spengel (n 55), 6
[74] Li (n 55), 82-83

single organisation, meaning that the parent entity directs the activities of its subsidiaries to maximise profits and mitigate tax liability,[75] creating further complications for the unrelated parties hypothetical. Groups, as the OECD acknowledges, may be involved in transactions that independent enterprises would not undertake, due to the differing economic realities.[76] Those issues, especially in relation to the nature and benefits of MNEs, have been carried into the CJEU's fundamental freedoms and direct taxation jurisprudence in relation to the ALP.[77]

The methodological and practical limitations of the ALP are also evident in relation to valuable intangibles, which can create significant hurdles for the calculation of an arm's length price, and can be easily offshored.[78] Additionally, it is very hard, if not impossible, to properly allocate profits to each individual step of an integrated production chain.[79] Substantial differences can also exist in relation to vertically integrated groups, which can avoid pitfalls such as double marginalisation,[80] and in relation to domestic and multinational groups.[81] Furthermore, large scale deviations from the ALP can be based on sound and reasonable economic considerations,[82] creating substantial problems for the perception of the ALP as an anti-abuse mechanism. Finally, the nature of the ALP necessitates that an arm's length price be expressed in an often very wide range.[83] In short, there are inherent limitations in the methodology and rationale of the ALP.[84] As a result of those practical and theoretical limitations, there is a vivid debate on the merits of the OECD model as a whole.[85] Despite those limitations, the OECD model does not recognise or allow for alternatives.[86] In turn this means that the ALP remains prevalent, and widely used. For the purposes of the discussion of the tax

[75] Reuven S. Avi-Yonah and Haiyan Xu, 'Evaluating BEPS: A Reconsideration of the Benefits Principle and Proposal for UN Oversight' [2016] Harvard Business Law Review 185, 209
[76] OECD (n 60), para 1.11
[77] Schön, 'Transfer Pricing' (n 61), 94
[78] Sansing (n 54), 35-36. See also: Li (n 55), 83
[79] Luckhaupt, Overesch, and Schreiber (n 59), 101
[80] Jean Tirole, *The Theory of Industrial Organization* (MIT Press, 1990), 174; Nicolaides (n 23), 422
[81] Reuven S Avi-Yonah, Kimberly A Clausing, and Michael C Durst, 'Allocating Business Profits for Tax Purposes: A Proposal to Adopt a Formulary Profit Split' (2009) 9 Florida Tax Review 497, 501-503
[82] Schön, 'Transfer Pricing' (n 61), 96
[83] OECD (n 60), paras 3.55-3.62; Michael C Durst, 'OECD Guidelines: Causes and Consequences' in Wolfgang Schön, and Kai A Konrad (eds) *Fundamentals of International Transfer Pricing in Law and Economics* (Springer 2012), 127
[84] Tavares, Bogenschneider, and Pankiv (n 8), 136-137
[85] See for example: Avi-Yonah, Clausing, and Durst (n 81); Luckhaupt, Overesch, and Schreiber (n 59); Durst (n 83); Moritz Hiemann, and Stefan Reichelstein 'Transfer Pricing in Multinational Corporations: An Integrated Management- and Tax Perspective' in Wolfgang Schön, and Kai A Konrad (eds) *Fundamentals of International Transfer Pricing in Law and Economics* (Springer 2012); J Scott Wilkie, "Reflecting on the "Arm's Length Principle": What is the "Principle"? Where Next?" Wolfgang Schön, and Kai A Konrad (eds) *Fundamentals of International Transfer Pricing in Law and Economics* (Springer 2012)
[86] OECD (n 60), paras 1.15-1.31

ruling Decisions, the ALP as expressed in the OECD model remains the most relevant part of the TP international practice.

c. Methodology and Comparable Transactions

According to the OECD Guidelines, there are five main ways of determining and calculating the prices equivalent to those which would prevail on the market (arm's length prices). All of the methods rely, to an extent, on the notions of "controlled transactions" and "uncontrolled transactions". Controlled transactions are transactions between enterprises that are associated to each other, while uncontrolled transactions are transactions between unrelated, independent parties. The uncontrolled transactions need to be comparable to the controlled transactions examined in each case, meaning that their "economically relevant characteristics" must be sufficiently close to compare.[87] When assessing a TP situation to establish an arm's length price, the actual transactions undertaken must, in principle, be the ones examined, unless those transactions clearly do not follow an economic rationale and therefore do not remotely reflect economic reality.[88]

Comparable uncontrolled transactions can take place between one of the parties taking part in the controlled transaction (internal comparable), or between two parties neither of which is involved in the controlled transaction being scrutinised (external comparable).[89] Comparability is established when, if there are any differences between the situations being compared, those differences do not materially affect the specific condition being examined in any given method, or alternatively if accurate adjustments can be made to eliminate the effects of any and all differences.[90] The principles underpinning "comparability" can complicate things, as they illustrate the nature of the ALP as an approximation, rather than a concrete set of rules. The ALP is primarily concerned with the effects of the analysis (i.e. the identification of reliable comparables and the actual comparison) rather than its form – thus following an authorised process does not in and of itself guarantee an arm's length outcome.[91] However, such comparables may not be available in a large number of cases, as uncontrolled transactions are very rarely if ever the same as controlled ones.[92] This situation can be compounded by the different economic realities between groups and independent enterprises.[93]

The process of the comparability analysis itself is not linear, meaning that elements of the analysis may need to be repeated, potentially necessitating the

[87] *Ibidem*, para 1.33
[88] *Ibidem*, paras 1.64-1.65
[89] *Ibidem*, 24
[90] *Ibidem*, para 1.33
[91] *Ibidem*, paras 3.4-3.5
[92] Richard Collier and Joseph L Andrus, *Transfer Pricing and the Arm's Length Principle After BEPS* (OUP 2017), 106
[93] OECD (n 60), para 1.11; Nicolaides (n 23), 422-423

selection of a different method.[94] This analysis needs to take into consideration specific circumstances, including the evaluation of potential transactions by independent enterprises.[95] Additionally, the specific attributes of both the transaction and the entities involved, namely the functions performed by the entities, the characteristics of the relevant property or service, the relevant contractual terms, the broad economic circumstances, and the business strategies pursued by the entities must be taken into account to establish comparability.[96] Some of the comparability factors, such as risk, which is encompassed in the analysis of the functions,[97] can be particularly hard to ascertain and can give rise to issues relating to comparability itself.[98] A particular problem with the comparability analysis is the absence or scarcity of reliable and sufficient information,[99] which can be exacerbated, as Durst suggests, by the fact that there is a number of industries where only integrated firms operate.[100] Particularly, in relation to intangibles the identification of proper comparables can be especially challenging.[101] In short, it is clear that a great range of elements needs to be examined, and deviations that cannot be accurately remedied and eliminated render the transactions incomparable. Equally, it is clear that comparability can be limited as a result of imperfect information on comparables. Overall, the number of moving parts in the TP analysis, combined with the inherent limitations of the comparability analysis shows that determining what constitutes an arm's length price is far from easy.

d. Accepted Methods & the Most Appropriate One

The OECD Guidelines recognise five main methods for calculating an arm's length price. Those methods are split into the "traditional" and "transactional profit" methods. The three traditional methods are Comparable Uncontrolled Price (CUP), Resale Price, and Cost Plus.[102] Each of those has a different focal point,[103] and as such is relevant and useful in different contexts. All three methods can only be used where the controlled and uncontrolled transactions are actually comparable.[104] Those three methods are relatively simple and intuitive, but they come with the requirement of finding an actually comparable transaction. The traditional methods

[94] William H Byrne and Robert T Cole, *Practical Guide to U.S. Transfer Pricing* (3rd edn Matthew Bender 2016), 2-38.1
[95] OECD (n 60), paras 1.34-1.35
[96] *Ibidem*, paras 1.36-1.63
[97] *Ibidem*, para 1.47
[98] Luckhaupt, Overesch, and Schreiber (n 59), 102-103; Durst (n 83), 126
[99] Jean-Pierre Vidal, 'The Achilles' Heel of the Arm's Length Principle and the Canadian *GlaxoSmithKline* Case' (2009) 37 INTERTAX 512, 519
[100] Durst (n 83), 124-125
[101] Byrne and Cole (n 94), 2-28.1; Luckhaupt, Overesch, and Schreiber (n 59), 91-92, 101
[102] OECD (n 60), p.30
[103] *Ibidem*, paras 2.13, 2.21, 2.39-2.40
[104] *Ibidem*, paras 2.14-2.16, 2.23-2.25, 2.30, 2.41

tend to be the preferred ones, due to their conceptual simplicity.[105]As Avi-Yonah points out however, despite the fact that the three aforementioned methods have been hailed as a "gold standard", they do not apply to the vast majority of cases, due to their inherent methodological limitations,[106] including the necessity for often non-existent comparables. This is especially true in relation to transactions that involve assets such as valuable intangibles, which are not traded on markets, meaning that price comparability is virtually impossible to establish.[107]

The Transactional Profit methods are based on the examination of the profits that stem from specific controlled transactions of the associated enterprises participating in those transactions.[108] The first of those is the Transactional Net Margin Method (TNMM), which is based upon the examination of the net profit that a taxpayer realises from a controlled transaction or aggregated transactions, relative to an "appropriate" base which includes, *inter alia*, costs and assets.[109] The final method endorsed in the Guidelines is the Transactional Profit Split method, under which the combined profits are divided between the associated enterprises in an economically valid and rational way that is intended to approximate the division of profits in an arm's length, uncontrolled transaction.[110] Both methods have specific advantages and disadvantages, meaning that they apply to different situations.[111] The transactional profit methods are more complex than the traditional ones, and despite the fact they are generally not favoured by tax authorities,[112] they have been more successful in judicial solutions to TP problems,[113] and are the most commonly used ones.[114] In part, this is due to the fact that the transactional profit methods are better suited to taking into account the structural economic benefits that MNEs enjoy, as well as the residual value of intangibles.[115]

The OECD suggests that each of those methods, traditional or transactional profit, should apply to a different kind of transaction. Thus, the most appropriate method for a particular case must be identified. This means that in any given TP situation any method may be the most appropriate,[116] allowing tax authorities and MNEs a substantial level of freedom.[117] The choice of the most appropriate method

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[105] *Ibidem*, para 2.3
[106] Reuven S Avi-Yonah, *International Tax as International Law: An Analysis of the International Tax Regime* (Cambridge University Press 2007), 104, 106
[107] Luckhaupt, Overesch, and Schreiber (n 59), 91-92, 101
[108] OECD (n 60), paras 2.56-2.57
[109] *Ibidem*, para 2.58
[110] *Ibidem*, paras 2.108, 2.110-2.111
[111] See for example: *Ibidem*, paras 2.59-2.60, 2.62-2.64, 2.68-2.75, 2.109, 2.112-2.113,
[112] Eden (n 18), 621
[113] Jens Wittendorf, *Transfer Pricing and the Arm's Length Principle in International Tax Law* (Kluwer Law International 2010), 39
[114] Avi-Yonah (n 106), 106
[115] Li (n 55), 83
[116] Byrne and Cole (n 94), 2-36
[117] OECD (n 60), paras 2.2, 2.4-2.8, 2.11

will to an extent depend on the search for reliable comparables.[118] Under the OECD regime, MNEs (and tax authorities) retain the freedom to apply methods not described in the Guidelines, if such methods are deemed to be more appropriate than the OECD prescribed ones for the facts and circumstances of the individual case.[119] This is especially relevant in relation to modern MNEs whose primary value-creation stems from valuable intangibles and organisational capital, neither of which can be easily allocated to specific jurisdictions.[120]

Thus, beyond a stated preference for the "traditional methods" there is not much guidance as to which method ought to be used in a given TP situation. However, the limitations of the traditional methods mean that they cannot be applied in a number of cases,[121] while the use of the transactional profit methods can be highly situational. The Guidelines suggest that the appropriateness of a method should be determined based on a functional analysis, the availability of reliable and adequate information, specifically in relation to uncontrolled comparables, and the degree of comparability between the controlled and uncontrolled transactions under each method.[122] However, it is impossible to provide specific rules to cover every case.[123] There is also a divergence between EU Member States as to which method is to be employed – some States for example allow the taxpayer to pick the method,[124] and others prefer the CUP method if applicable,[125] while some prefer the TNMM.[126] There are also Member States that stick to the OECD's preference for traditional methods over the other methods,[127] while some accept any OECD approved method as equally applicable.[128] In effect, it is clear that the method that ought to be used is the so-called "most appropriate" one, which will heavily depend on the specifics of each case. However, despite the differing focal points of each method, reliable comparables need to be identified, and, as per the requirements of the comparability analysis, the differences between the comparables must not affect the conditions being examined in any given method in a material way.

e. TP and the ALP in the EU

It is clear that the application of the OCED ALP, even based solely on the Guidelines, can be tricky. In a national context, this is exacerbated, as the OECD

[118] *Ibidem*, paras 3.1-3.4
[119] *Ibidem*, para 2.9
[120] Sansing (n 54), 50
[121] Avi-Yonah (n 106), 106
[122] OECD (n 60), para 2.2
[123] *Ibidem*, para 2.10
[124] See: EY, 'EY Worldwide Transfer Pricing Reference Guide 2018-19' (2019), 63-64, 435
[125] *Ibidem*, 143, 316, 374, 480
[126] *Ibidem*, 184
[127] *Ibidem*, 203, 217, 274, 450, 480
[128] *Ibidem*, 39, 147, 171, 239, 306, 322, 476

Guidelines merely provide for a model, designed to facilitate the administration of an ALP-based TP regime.[129] Therefore, even if the ALP were, in principle, universally present in the tax systems of Member States, its application is not uniform.[130] Additionally, the manner and extent to which a Member State implements TP regulations and the ALP can greatly affect its fiscal competitiveness.[131] As such, Member States can use the margin of discretion afforded by the ALP to improve their fiscal competitiveness,[132] further showcasing the difficulties inherent in a uniform application of the principle. It has also been suggested that, beyond issues of systemic competitiveness, governments can compete to maximise their own returns from specific TP situations.[133] It is also worth noting that not all Member States rely on the same calculation methods.[134] Furthermore, not all Member States apply TP rules on the same classes of transactions.[135] Thus, the level and means of compliance with the Guidelines and the ALP in general will be dependent on the domestic tax legislation and administrative practices of individual States,[136] and there is no general agreement or convergence of practices in relation to enforcement or penalties.[137] To further illustrate the differential application, even in the case of anti-abuse measures like the ones contained in the Anti Tax Avoidance Directives (ATADs),[138] the introduction of those measures in national tax systems has not been uniform,[139] as the anti-abuse measures have to make sense in the context of individual tax systems.

TP rules, given that they tend to apply primarily to international transactions can in principle fall foul of the fundamental freedoms, as they can be discriminatory

[129] Tavares, Bogenschneider, and Pankiv (n 8), 179
[130] This can be evidenced by the form and content of the Joint Transfer Pricing Forum's APA Guidelines.
[131] See for example: Raf Bogaerts, 'Corporate Tax Reform Influences Luxembourg's International Competitiveness as Holding Company Location' (2002) 42 European Taxation 380
[132] Wattel, 'Stateless Income' (n 51), 791
[133] Pascalis Raimondos-Møller and Kimberley Scharf, 'Transfer Pricing Rules and Competing Governments' (2002) 54 Oxford Economic Papers 230, 235
[134] Compare for example 'Croatia – Transfer Pricing Profile', point 4 <https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/company_tax/transfer_pricing/forum/profiles/tpprofile-hr.pdf> accessed on 03/09/2020, with 'Italy - Transfer Pricing Profile', point 4 <https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/company_tax/transfer_pricing/forum/profiles/tpprofile-it.pdf> accessed on 03/09/2020
[135] Compare: EY (n 124), 183-184, 202-203, 435, 497.
[136] Byrne and Cole (n 94), 2-65
[137] Lohse, Riedel, and Spengel (n 55), 12-18
[138] Council Directive 2016/1164/EU of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market [2016] OJ L 193/1; Council Directive (EU) 2017/952 of 29 May 2017 amending Directive 2016/1164/EU as regards hybrid mismatches with third countries [2017] OJ L 144/1
[139] Adrian Grant, Emmanuel Blétière, Daniel Gutmann, Andres Perdelwitz, René Offermanns, Marnix Schellekens, Giulia Gallo, and Magdalena Olejnicka, 'The Impact of ATAD on Domestic Systems: A Comparative Survey' (2017) 57 European Taxation 2

to cross-border activities.[140] This follows from the fact that TP rules applicable to international transactions could create hurdles for multinational undertakings operating across borders when compared to the wholly internal activities of such undertakings based in the Member State where the TP rules are applicable, by potentially treating cross-border transactions differently to domestic ones. Clearly, this creates a situation where the non-domestic MNE is to an extent restricted, or at least placed at a disadvantage, in relation to the exercise of its free movement rights in the pursuit of economic activity. This situation in turn can result in a violation of the fundamental freedoms.[141] At the same time, the ALP can be used as part of the analysis of abuse of (indirect) tax measures, in the sense that if a transaction is established to conform to arm's length terms, then the transaction will not be deemed to be abusive and therefore contrary to the VAT Directive,[142] which however contains a specific reference to the ALP;[143] albeit without providing a definition. The arm's length principle also features in the ATAD I,[144] and is recognised in the Arbitration Convention.[145] However, no actual definition of the ALP exists in EU primary or secondary law.[146]

As mentioned above, the ALP allocates profits and by doing so arguably allocates the power to tax a fragment of those profits to the States involved in a multinational transaction.[147] However, national ALP rules do not create taxing rights, but rather protect the allocation of those rights, meaning that they relate to the exercise of taxing powers, falling within the purview of the fundamental freedoms.[148] Even though the Court did not refer to the ALP by name, it recognised its rationale in *SGI*.[149] The Court explained that a rule taking the form of the ALP allows for the Member State to exercise its taxing jurisdiction to activities carried out in its territory, or in other words safeguard the balanced allocation of taxing powers.[150] This links

[140] Schön, 'Transfer Pricing' (n 61), 74-75, 83-87
[141] Case C-311/08 *Société de Gestion Industrielle (SGI) v Belgian State* ECLI:EU:C:2010:26, para 50; Case C-345/05 Commission v Portugal ECLI:EU:C:2006:685, para 15
[142] Case C-103/09 *The Commissioners for Her Majesty's Revenue and Customs v Weald Leasing Ltd* ECLI:EU:C:2010:804, paras 44-45
[143] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006]
OJ L 347/1, Article 72
[144] Council Directive 2016/1164 (n 138), preamble 14, Articles 5(6) and 8(2)
[145] Arbitration Convnetion (n 15), Article 4(1). See also: Case C-311/08 *Société de Gestion Industrielle (SGI) v Belgian State* Opinion of AG Kokott, ECLI:EU:C:2009:545, paras 6-7
[146] Fausta Todhe, 'The Rise of an (Autonomous) Arm's Length Principle in EU State Aid Rules' (2019) 18 European State Aid Law Quarterly 249, 257
[147] Schön, 'Transfer Pricing' (n 61), 80, 89
[148] *Ibidem*, 88. See also: Case C-190/12 *Emerging Markets Series of DFA Investment Trust Company v Dyrektor Izby Skarbowej w Bydgoszczy* ECLI:EU:C:2014:249, paras 58-59; Case C-379/05 *Amurta SGPS v Inspecteur van de Belastingdienst/Amsterdam* ECLI:EU:C:2007:655, paras 37-39; Case C-170/05 *Denkavit Internationaal BV and Denkavit France SARL v Ministre de l'Économie, des Finances et de l'Industrie* ECLI:EU:C:2006:783, para 44
[149] *SGI* (n 141), para 76
[150] *Ibidem*, paras 60-64

the ALP to the notion of territoriality,[151] as the ECJ seems to confirm.[152] The Court has tied the application of the balanced allocation of taxing powers justification to that of abuse,[153] arguably meaning that under the fundamental freedom rules the ALP can only apply to actually abusive measures.

In the case law, the ALP can also be used to showcase the proportionality of a national anti-avoidance tax measure,[154] and as a rule of thumb to distinguish between artificial arrangements and genuine economic transactions.[155] The same rationale can be found in a Council Resolution on CFCs and Thin Cap rules.[156] However, this does not hold true in relation to a generally discriminatory rule – compliance with the Model Convention and the OCED Guidelines does not mean that such a national rule is not discriminatory.[157] The Court has also recognised that deviating from nationally mandated arm's length pricing can be justified, if it makes commercial sense.[158] This commercial justification for an ALP deviation can be based solely on an economic interest in the "financial success" of group companies and subsidiaries.[159] The fact that the ECJ's jurisprudence on TP rules and the fundamental freedoms has consistently linked the ALP to the prevention of abuse means that economically rational decisions will have to be accepted in national applications of the ALP, even if they do not represent an arm's length outcome, as they are not wholly artificial and therefore do not threaten the balanced allocation of taxing powers.[160]

In essence, bearing in mind the definition of wholly artificial arrangements,[161] only transactions whose sole purpose is the mitigation of tax exposure could

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[151] Schön, 'Transfer Pricing' (n 61), 97

[152] Case C-382/16 *Hornbach-Baumarkt AG v Finanzamt Landau* ECLI:EU:C:2018:366, para 40

[153] Schön, 'Transfer Pricing' (n 61), 91-93. See also: *SGI* Opinion of AG Kokott (n 145), paras 72-73

[154] Case C-524/04 *Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue* ECLI:EU:C:2007:161, paras 71, 92

[155] *Ibidem*, para 81; *SGI* Opinion of AG Kokott (n 145), para 68; Case C-524/04 *Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue* Opinion of AG Geelhoed ECLI:EU:C:2006:436, para 66

[156] Council Resolution of 8 June 2010 on coordination of the Controlled Foreign Corporation (CFC) and thin capitalisation rules within the European Union, OJ C 156/1, 1–2

[157] Case C-324/00 *Lankhorst-Hohorst GmbH v Finanzamt Steinfurt* ECLI:EU:C:2002:749, paras 39-42; Case C-324/00 *Lankhorst-Hohorst GmbH v Finanzamt Steinfurt* Opinion of AG Mischo ECLI:EU:C:2002:545, paras 79-81. See also, for the general analysis on discrimination: *Thin Cap* (n 154), paras 36-63

[158] *Hornbach-Baumarkt* (n 152), paras 54-56; *Thin Cap* Opinion of AG Geelhoed (n 155) para 67

[159] *Ibidem*, para 56; para 67, respectively.

[160] *Hornbach-Baumarkt* (n 152), paras 54-56; Schön, 'Transfer Pricing' (n 61), 96-97; Svitlana Buriak and Ivan Lazarov, 'Between State Aid and the Fundamental Freedoms: The Arm's Length Principle and EU Law' (2019) 56 Common Market Law Review 905, 940-941. See also: Moritz Glahe, 'Transfer Pricing and EU Fundamental Freedoms' (2013) 22 EC Tax Review 222

[161] Wholly artificial arrangements are defined in the case law as arrangements that do not reflect economic reality and whose purpose is the circumvention of the normal application of fiscal rules in order to escape normal tax liability. However, arrangements which are designed to facilitate the

conceivably be caught by ALP provisions in the internal market, as an economically sound arrangement would also be in line with the goal of efficiently allocating resources. The overall case law on the ALP and the internal market clearly relates to the application of Member States' ALP, which may or may be derived, and may be informed to a differing degree, from the OECD's formulation. In effect therefore, it is clear that TP rules and the ALP can be scrutinised under the lens of the fundamental freedoms, but at the same time, if they fall foul of those rules, they can potentially be justified. This is because the Court has tied the ALP to the prevention of abuse and the protection of the balanced allocation of taxing powers. However, the ECJ recognises that restrictions placed outside the scope of those justifications, for example by restricting an arrangement which is underpinned by economic rationality, would not be justifiable under the scheme of fundamental freedoms law. Simply put therefore, national ALP laws can only catch genuinely abusive arrangements, and must accept economically reasonable non-arm's length outcomes. It is clear in this context that fundamental freedoms law can have an influence on the application of national ALP rules, necessitating to an extent a light touch, but does not affect the content of those rules. Such rules are neither made compulsory nor prohibited, as free movement law examines the application of the national rules.

f. Conclusion

It becomes apparent that ascertaining whether a transaction was carried out in accordance with the ALP is not easy. It is clear that the ALP and the OECD TP regime, on top of not being legally binding or uniformly applied, are extremely complex and rely on a multifaceted comparative analysis. The vast amount and width of information required to carry out the comparison required by the nature of the ALP mean that in some cases, especially when dealing with complex corporate structures and intangibles, the identification, and subsequent use of reliable comparables can be extremely hard,[162] which neuters the effectiveness of the analysis. Additionally, the ALP conceptually struggles to take into account some of the economic benefits associated with being part of an integrated group. Beyond this, despite its wide recognition as a useful tool to prevent TP abuses, the ALP

efficient allocation of resources, as per Article 120 TFEU, cannot be deemed to be artificial. See: Case C-201/05 *Test Claimants in the CFC and Dividend Group Litigation v Commissioners of Inland Revenue* ECLI:EU:C:2008:239, paras 75-76; Case C-196/04 *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue* ECLI:EU:C:2006:544, paras 51, 55-56; Case C-110/99 *Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas* ECLI:EU:C:2000:695, para 51; Schön, 'Transfer Pricing' (n 61), 94. See also: Pasquale Pistone, 'European Direct Tax Law: Quo Vadis?' in L Hinnekens and P Hinnekens (eds) *A Vision of Taxes Within and Outside European Borders: Festschrift in Honor of Prof. Dr. Frans Vanistendael* (Wolters Kluwer 2008), 718

[162] See for example: William H Byrnes, 'Boiling Starbucks' Roasting Down to the Essence of its Residual' (2019) Texas A&M University School of Law Legal Studies Research Paper No. 19-49, 4-14, 20-27

cannot be said to be uniformly applied – the same holds true of the TP Guidelines, as they are a soft law instrument, designed to fit in with vastly different national tax systems and approaches to TP.

It is clear that the ALP is not a clear-cut or legal test, but rather a test based on complex economic factors, often mired by information asymmetry. It is also important to note that the OECD is not too restrictive on its approach, allowing for deviations, and recognising that TP is not an exact science, requiring the exercise of a wide margin of discretion on behalf of both the taxpayer and the tax authorities.[163] This allows for considerable leeway,[164] while even the choice of the most appropriate method is not clear.[165] In brief, the ALP as it exists in the OECD TP Guidelines is far from being uniform in its application, while also suffering from clear practical and theoretical limitations. The comparability analysis that sits at the core of the ALP is itself limited due to the common lack of reliable and adequate comparables.[166] Beyond this, there is no uniformity in enforcement rules or penalties, or even documentation requirements.[167] Finally, the width of the acceptable arm's length ranges showcases that even within one of the approved methods, and even if the comparability assessment is carried out in the best way possible, the actual arm's length outcome can vary wildly.[168] Arguably, those issues and limitations make the ALP, as encoded in the OECD Guidelines and as accepted by the ECJ, a problematic benchmark upon which the existence of an advantage, for the purposes of State aid law, is to be assessed.

V. The Tax Ruling Decisions

Thus far, this Chapter has, albeit briefly, provided some necessary context on some of the fiscal elements that feature heavily in the factual patterns and the reasoning employed in the Commission's tax ruling and transfer pricing State aid Decisions. This Part will first briefly set out the factual patterns and then outline the rationale of the recent Decisions. The most headline-grabbing Decisions were the ones aimed at Starbucks, Fiat Finance and Trading (FFT), Apple, and Amazon. However, there are many more Decisions that need to be discussed. A common theme with almost all the Decisions is that they target (usually very large) MNEs, and tend to have a tax ruling as their starting point. The Commission has also investigated McDonald's, and ENGIE (formerly GDF Suez), while also looking into a Belgian Excess Profit Scheme. Additionally, the Commission examined Gibraltar's tax ruling regime, and certain tax exemptions. The following section will briefly outline the facts and reasoning employed in those Decisions. In discussing the facts,

[163] See for example, OECD (n 60), paras 1.13, 3.55
[164] Luckhaupt, Overesch, and Schreiber (n 59), 92
[165] OECD (n 60), para 4.8
[166] Luckhaupt, Overesch, and Schreiber (n 59), 102-106
[167] Lohse, Riedel, and Spengel (n 55), 12-18
[168] Durst (n 83), 127

this section will provide a brief analysis, while the discussion of the rationale will focus on the notions of advantage and selectivity. This is because the nature of the alleged aid as fiscal and operating, and the sums involved, mean that the twin criteria of effect on trade and distortion of competition are almost certainly met. In relation to the State resources criterion, the measures will be imputable to the State, while if an advantage is indeed present there is no doubt that the monies that financed it represent lost revenue or at the very least foregone resources.

a. Factual Patterns

From the outset, it is worth noting that all individual Decisions deal with complex factual patterns, usually involving a number of affiliated enterprises, and not necessarily orthodox accounting practices. As such, as thorough review of the facts of each and every case is outside the scope of this thesis. Rather, this part will focus on some common elements and sketch the outline of the facts.

The final Decisions in Starbucks, Fiat, Apple, Amazon, the Belgian Excess Profit Scheme, ENGIE, and McDonald's all revolve around MNEs and the existence of tax rulings. In all instances, the party who received the tax ruling was a subsidiary, or a branch of a subsidiary, within a larger group.[169] The tax rulings in effect confirmed the tax treatment of those entities, in the context of the group in which they operate. Those tax rulings fixed the basis for the entities' remuneration,[170] fixed the amount of licence and royalty fees,[171] confirmed the tax residency of the entities involved,[172] accepted combinations of transactions between affiliated entities,[173] or deemed certain types of profit exempt following from somewhat artificial calculations.[174] In all instances, the alleged advantage stemmed, primarily, from the

[169] Commission Decision (EU) 2017/502 of 21 October 2015 on State Aid SA.38374 (2014/C ex 2014/NN) implemented by the Netherlands to Starbucks [2017] OJ L 83/38, recital 141; Commission Decision (EU) 2016/2326 of 21 October 2015 on State Aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat, [2016] OJ L 351/1, recitals 40-51; Commission Decision (EU) 2017/1283 of 30 August 2016 on State Aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple [2017] OJ L 187/1, recitals 39, 48-52; Commission Decision (EU) 2018/859 of 4 October 2017 on State Aid SA.38944 (2014/C) (ex 2014/NN) implemented by Luxembourg to Amazon [2018] OJ L 153/1, recitals 100-105, 108; Commission Decision (EU) 2016/1699 of 11 January 2016 on the excess profit exemption State Aid scheme SA.37667 (2015/C) (ex 2015/NN) implemented by Belgium [2016] OJ L 260/61, recitals 13, 20-21; Commission Decision (EU) 2019/421 of 20 June 2018 on State Aid SA.44888 (2016/C) (ex 2016/NN) implemented by Luxembourg in favour of ENGIE, OJ L 78/1 [2019] recitals 19-22; Commission Decision (EU) 2019/1252 of 19 September 2018 on tax rulings SA.38945 (2015/C) (ex 2015/NN) (ex 2014/CP) granted by Luxembourg in favour of McDonald's Europe [2019] OJ L 195/20, recitals 16-20

[170] Starbucks Decision (n 169), recitals 40-43; Fiat Decision (n 169), recitals 54-57; Apple Decision (n 169), recitals 39, 59-62

[171] Amazon Decision (n 169), recitals 126-128

[172] Amazon Decision (n 169), recitals 125-126; McDonald's Decision (n 169), recitals 34-38

[173] ENGIE Decision (n 169), recital 26

[174] Belgium Decision (n 169), recitals 13-15, 18. See also: Thomas Jaeger, 'Tax Concessions for Multinationals: In or Out of the Reach of State Aid Law?' (2017) 8 Journal of European Competition Law and Practice 221, 224

content of those tax rulings and the calculations inherent in them. Those issues are not necessarily of the same magnitude. For example, in ENGIE the structure endorsed by the tax rulings combined a deduction at subsidiary level with an exemption at holding company level, engineering an internal D/NI situation, which meant that effectively no tax was paid,[175] while in McDonald's the ruling simply recognised that the subsidiary was tax resident in Luxembourg, and could thus benefit from the network of DTCs – the actual benefit merely came from the application of those DTCs.[176]

The Commission also issued a "systemic" Decision relating to Gibraltar's tax ruling regime alongside exemptions for passive interest and royalties.[177] This Decision relates to tax rulings, but does not delve into transfer pricing or mismatches, and as such is different from the ones discussed above. This is because the Commission examined over 160 tax rulings to ensure they had correctly applied national tax law,[178] as opposed to conducting a thorough analysis of the arm's length character of tax rulings relating to one group of undertakings.

The problems with the tax rulings, and the calculations and profit allocations they confirmed and endorsed, partly relate to the fact that in most cases a transactional profit method, usually TNMM, was employed.[179] As mentioned above those methods have some distinct advantages, but are also much more complex and less intuitive when compared to the traditional methods. Another complicating factor in several Decisions was the existence and licencing of valuable and unique IP. In Starbucks those rights were held by a UK limited partnership and licenced to the subsidiary,[180] while in Apple they were assigned to the central offices of the subsidiaries instead of their Irish branches.[181] In Amazon, the IP was held by a tax transparent and non-taxable resident entity and licenced to the primary European operator for a fee,[182] and finally in McDonald's the IP rights were held by the subsidiary, but assigned to its US branch which collected royalties, while a Swiss branch was in charge of licencing the IP to franchisors.[183]

There were also some problems specific to individual cases, like the fact that Apple's subsidiaries were technically stateless,[184] or the diverging definitions and

[175] ENGIE Decision (n 169), recitals 35-42, 62-69
[176] McDonald's Decision (n 169), recitals 34-38
[177] Gibraltar Decision (n 26), recitals 33-40, 44-51
[178] *Ibidem*, recitals 128-155
[179] Starbucks Decision (n 169), recital 55; Fiat Decision (n 169), recitals 54-57; Apple Decision (n 169), recitals 328-332; Belgium Decision (n 169), recital 16; Amazon Decision (n 169), recitals 144-145, 152-153
[180] Starbucks Decision (n 169), recitals 44, 104, 146
[181] Apple Decision (n 169), recitals 259-261, 307, 310-318
[182] Amazon Decision (n 169), recitals 116, 126-128
[183] McDonald's Decision (n 169), recitals 22, 28-33,
[184] Apple Decision (n 169), recitals 48-52, 276

practices between the US and Luxembourg in relation to permanent establishments, which allowed the US branch and IP holder to be taxable neither in Luxembourg nor the US, under the DTC between the two countries.[185] Another example is the creation of an internal mismatch in ENGIE.[186] However, it is clear that the common threads of the majority of those Decisions relate to the arm's length character of the arrangements stemming from the contested tax rulings,[187] with McDonald's being the sole case where the core of the problem was the application of the US-Luxembourg DTC,[188] rather than transfer pricing.

In brief, the facts that gave rise to the Commission's tax ruling Decisions are in themselves rather complex, as can be evidenced by the length of those Decisions. However, with the exception of Gibraltar which revolved, in part, around the entire tax ruling practice of the tax jurisdiction, it is clear that there are some basic common threads in the factual patterns. Despite the fact that each case deals with different facts which can add layers of complexity, it is clear that all the Decisions deal with MNEs and tax rulings, in most instances APAs. In this context, and bearing in mind the complexities inherent in TP especially in relation to unique intangibles, the main issue in the Decisions in the application of the ALP in the tax rulings concerned. Under this prism, to scrutinise the application of the ALP or other TP rules in the context of each individual Decision would require a thorough economic analysis of the facts, which is outside the scope of this thesis. The context provided in relation to the subject-matter of the Decisions, and the general structure of the facts is sufficient to allow for an examination of the Commission's and the Court's rationale.

b. Reasoning

The Commission employs a very similar reasoning in almost all of the tax ruling Decisions it has issued thus far. To an extent, this follows from the similar subject-matter of the cases, and the factual similarities outlined above. There are of course cases, specifically Gibraltar and McDonald's, where the reasoning does not follow the structure and rationale that informs the other Decisions. This is because on the one hand Gibraltar is a "systemic" case, while in McDonald's despite the existence of a tax ruling, the core issue was the application of web of DTCs, especially in relation to the US-based branch.

First of all, as it has been explained in the previous Chapters, three of the five criteria of State aid are generally easy to satisfy in relation to fiscal cases. Namely, the effect on trade and distortion of competition criteria are effectively automatically satisfied in relation to operating and fiscal aid, especially considering the sums

[185] McDonald's Decision (n 169), recitals 39-46
[186] ENGIE Decision (n 169), recitals 23-26, 35-42, 62-69
[187] See for example: Starbucks Decision (n 169), recitals 155-160; Fiat Decision (n 169), recital 147; ENGIE Decision (n 169), recitals 92-96
[188] McDonald's Decision (n 169), recital 66

involved in the recent Decisions.[189] The inherent purpose and internal logic of the State resources criterion also mean that both limbs of it, imputability and placing a burden on State resources, will be satisfied if an advantage is present. A tax ruling is imputable to the tax authorities, and thus the State, while even if the Member States can claim that the tax rulings allowed them to increase their tax revenue due to the incentivising effects of the aid on the MNE's location, the difference between the taxes collected and those that ought to have been collected represents at the very least foregone revenue.[190] Thus, it is clear that the criteria on which the analysis should be focused in the tax ruling Decisions are selectivity and advantage.

In this regard, the Commission does not do a great job at keeping the two criteria, or their respective analyses, separate. Instead, in all but one of the relevant Decisions,[191] the two notions are collapsed under one heading and analysed in tandem as a "super-criterion" of selective advantage.[192] In the context of this analytical approach, the Commission argues that the derogation from the reference framework, in the second step of the three-step selectivity test, and the identification of the advantage coincide.[193] The Commission's analysis, in effect, starts as a typical fiscal selectivity analysis by identifying the reference framework, and then examines the advantage as a derogation from that framework. In effect, it splices the advantage analysis into that of selectivity.

The Commission argued first of all that in instances where the aid was individual, the existence of the advantage could establish a presumption that said advantage was granted selectively.[194] However, the Commission also examined selectivity by applying the three-step test. In that analysis, the Commission determines the reference framework to be the general system of corporate taxation whose objective is the taxation of corporate profits, which in effect makes all undertakings comparable.[195] In a number of Decisions, the Commission also offered

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[189] Case C-301/87 *France v Commission* ECLI:EU:C:1990:67, para 44; Case C-88/03 *Portugal v Commission* ECLI:EU:C:2006:511, para 91; Case C-496/06 P *Commission v Italy and Wam SpA* ECLI:EU:C:2009:272, para 51

[190] Joined cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission* ECLI:EU:C:2006:416, paras 127-129; Case C- 279/08 P *Commission v The Netherlands (NOx)* ECLI:EU:C:2011:551, para 104

[191] Amazon Decision (n 169), recitals 401 et seq., 580 et seq.

[192] Starbucks Decision (n 169), recital 229; Fiat Decision (n 169), recital 191; Apple Decision (n 169), recital 225; Belgium Decision (n 169), recital 118; ENGIE Decision (n 169), recital 161

[193] Starbucks Decision (n 169), recitals 253-254; Fiat Decision (n 169), recitals 217-218; Apple Decision (n 169), recital 245; Belgium Decision (n 169), recitals 131-134; ENGIE Decision (n 169), recitals 193, 198. See also: McDonald's Decision (n 169), recitals 111-117; Gibraltar Decision (n 26) recitals 184-187

[194] See for example: Fiat Decision (n 169), recital 218; Apple Decision (n 169), recital 224; Amazon Decision (n 169), recitals 582-584. See also: Case C-15/14 P *Commission v MOL Magyar Olaj- és Gázipari Nyrt* ECLI:EU:C:2015:362, para 60

[195] Starbucks Decision (n 169), recitals 232, 251; Fiat Decision (n 169), recitals 194, 209; Apple Decision (n 169), recitals 228-229, 246-248; Amazon Decision (n 169), recitals 587-589; Belgium

a subsidiary line of reasoning, where it determined the reference framework to be narrower, and comprised of the relevant national laws applicable to the situations examined.[196] Nonetheless, it is clear that the core analysis of selectivity, or rather of "selective advantage" is undertaken under the much wider, general reference framework.

In the context of this reference framework, it is assumed, as a result of the wide comparability that follows from the framework's objective, that if the methodology endorsed in the contested tax ruling deviates from a reliable "approximation of market-based outcomes", then it derogates from the reference framework, meaning that a selective advantage will be present.[197] This reasoning is facilitated by the fact that, as will be discussed at length in the following Chapter, the Commission argues that there is an ALP inherent in the application of Article 107(1) TFEU, as a result of a principle of equality.[198] This ALP is thus different and independent from either national ALP rules, or the OECD's approach.[199] Practically, this means that a deviation from the ALP in a tax ruling confers an advantage, as a deviation from the ALP is construed as a departure from a reliable "approximation of market-based outcomes".[200]

Following from this, the bulk of the Commission's reasoning is a thorough examination of the arm's length character of the outcomes endorsed in the contested tax rulings. Effectively, the Commission conducts a TP analysis, looking at all the relevant factors, in order to establish a deviation from the ALP.[201] In all the Decisions examining the ALP, the Commission concluded that there had indeed been a deviation from it, establishing the existence of an advantage as a deviation from the ALP, and as a derogation from the reference framework.[202] Even under the

Decision (n 169), recitals 121-129, 135-141; ENGIE Decision (n 169), recitals 171-176; McDonald's Decision (n 169), recital 107; Gibraltar Decision (n 26), recitals 176-177

[196] Starbucks Decision (n 169), recitals 409-412, 416; Fiat Decision (n 169), recitals 315-316, 325; Apple Decision (n 169), recitals 369-379; Amazon Decision (n 169), recitals 600-602; ENGIE Decision (n 169), recitals 204-215

[197] Starbucks Decision (n 169), recital 267; Fiat Decision (n 169), recital 339; Apple Decision (n 169) recital 258; Amazon Decision (n 169), recital 406; Belgium Decision (n 169), recitals 169-170

[198] Starbucks Decision (n 169), recitals 255-264; Fiat Decision (n 169), recitals 225-228; Apple Decision (n 169), recitals 249-257; Belgium Decision (n 169), recitals 145-151

[199] See for example: Fiat Decision (n 169), recital 228

[200] Starbucks Decision (n 169), recitals 255-264; Fiat Decision (n 169), recitals 221-231; Apple Decision (n 169), recitals 249-258; Amazon Decision (n 169), recitals 402-403, 406; Belgium Decision (n 169), recitals 134, 145-151

[201] *Ibidem*, recitals 268-408; recitals 234-311; recitals 259-360; recitals 407-408, 447, 518-579; recitals 152-168, respectively

[202] *Ibidem*, recital 415; recitals 339-340; recitals 321, 333, 360; recitals 561, 578-579; recital 169-170, respectively

narrower, subsidiary, reference framework, the same approach was utilised, and the same conclusion was reached.[203]

Thus, in all the Decisions, bar McDonald's, the Commission reached the conclusion that a selective advantage was present, meaning in effect, in the context of the relative lack of substance of the remaining three criteria, that the contested tax rulings did in fact constitute State aid. In the context of McDonald's, the tax benefit was simply the result of an entity mismatch, and thus not problematic from a State aid perspective.[204] In Gibraltar, where the Commission examined more the 160 tax rulings, most of them, even those correctly applying problematic tax laws, were not found to confer aid in and of themselves, the exception being a handful of rulings which for a period of time (clearly) departed from national tax laws.[205] Those two Decisions show that tax rulings, and tax ruling practices in general, are not *per se* problematic. However, the Commission's reasoning in relation to the APAs, as opposed to the straight tax rulings, raises significant issues, centred around the existence and utilisation of an ALP inherent in EU law. In effect, even if tax rulings are legally acceptable, the same cannot readily be said of rulings dealing with TP and the application of the ALP.

VI. Conclusion

This Chapter has discussed some elements of international taxation that are relevant to any discussion of the Commission's approach in the recent tax ruling Decisions. First of all, tax rulings, despite being potentially abusable, are generally recognised as being fiscally beneficial for tax authorities and taxpayers, and are generally not problematic from a State aid perspective. In fact, it has been shown that their nature and logic make the application of State aid rules to them far from obvious. Mismatches were also shown to be highly abusable, but more often than not simply result from the exercise in parallel of taxing powers by two or more States, in the context of an unharmonised global tax environment.

The ALP, even though it is a staple of international tax practice, is far from clear in its application. The non-binding nature of the TP Guidelines, combined with the foundational hypothetical of the ALP, namely the evaluation of controlled transactions as if they had occurred on the free market, make practical divergences unavoidable. It is also unclear which methodology should be utilised, while limited comparability data, and the prevalence of (wide) ALP ranges make it clear that applying this principle is more of an art than a science. The whole ALP regime is mired in uncertainty and approximations, meaning that a clear-cut answer to whether a given APA is in line with the ALP, especially an ALP external to the system

[203] See for example: Starbucks Decision (n 169), recitals 422-423; Amazon Decision (n 169) recitals 600-602; ENGIE Decision (n 169), recitals 204-215
[204] McDonald's Decision (n 169), recital 126
[205] Gibraltar Decision (n 26), recitals 128-187

in which the APA was concluded, is not always possible.[206] This inherent flexibility and uncertainty can arguably be problematic in the context of the (objectively defined) notion of an advantage for the purposes of State aid.

Those elements of international taxation provide the context in which the recent Decisions ought to be analysed. It has been shown that despite their complex facts, most of the Decisions revolve around similar patterns, and employ a very similar, for the most part, rationale. This albeit brief breakdown of the facts and reasoning of the tax ruling Decisions allows for a critical evaluation of that rationale in a more abstract way, and in the context of the notion of fiscal State aid, as it emerges from the previous Chapters.

[206] Kyle Richard, 'Are All Tax Rulings State Aid: Examining the European Commission's Recent State Aid Decisions' (2018) 18 Houston Business and Tax Law Journal 1, 43; Werner Haslehner, 'Double Taxation Relief, Transfer Pricing Adjustments and State Aid Law' in I Richelle, W Schön, E Traversa (eds) *State Aid Law and Business Taxation* (Springer 2016), 148; Gunn and Luts (n 25), 121, 124-125

Critical Analysis of the Tax Ruling Decisions

I. Introduction

This Chapter will build on the summary of the complex factual patterns that gave rise to the Commission's recent tax rulings and fiscal aid Decisions, and the outline of the reasoning employed in those Decisions in relation to the notions of selectivity and advantage discussed in the previous Chapter. This Chapter will critically evaluate and analyse the notion of fiscal State aid as it emerges from those Decisions. In doing so, it will focus on the arguments raised by the Commission, and where available, the response of the General Court.[1] This Chapter will use the discussion of tax rulings and the ALP in the previous Chapter as a springboard for some elements of the discussion.

First of all, the major problematic element of the Commission's reasoning is the claim that Article 107(1) TFEU contains an autonomous EU ALP. This Chapter will evaluate the case law foundations of this claim, and will discuss the rationale based on which the Commission made it. Additionally, the content and nature of an EU ALP will be analysed, based on the Decisions and the available judgments. Following from this, issues of tax policy and the potential infringement of fiscal sovereignty stemming from an EU ALP will be discussed. Second, given the use of the EU ALP primarily as part of the advantage analysis, this Chapter will discuss the burden and standard of proof attached to it, in an attempt to find the practical limits of the Commission's review of tax rulings under the lens of this newly minted principle. Third, the reference framework employed for the purposes of the selectivity analysis will be criticised, both in relation to its width and in relation to its content. Finally, the combined criterion of "selective advantage", employed by the Commission, will be discussed. As a whole, this Chapter will aim to showcase the more problematic elements of the Commission's reasoning both on a case-by-case basis and in general terms as they relate to the notion of fiscal aid. Such a discussion is important and relevant, as the recent Decisions and their reasoning are bound to test the limits of the application of the State aid rules in relation to taxation.[2]

II. An EU ALP?

One of the most striking features of the 2016 Notice on the Notion of Aid, and of the recent Decisions, is the fact that the Commission seemingly discovered an EU arm's length principle, hiding in plain sight for almost sixty years, embedded in Article 107(1) TFEU. As is evident from the discussion of the Commission's arguments in Decisions,[3] the use of the ALP is pivotal to their success. Specifically,

[1] At the time of writing, no Case stemming from the Decisions discussed has reached the ECJ, and only four have been decided by the EGC.
[2] Conor Quigley, *European State Aid Law and Policy* (3rd edn, Hart Publishing 2015), 10
[3] See Part V of the Tax Rulings, the Arm's Length Principle, and the Commission's Decisions Chapter.

in most of the Decisions, the crux of the Commission's assessment of the existence of aid revolves around the non-arm's length character of the arrangements endorsed by the contested tax rulings. Interestingly, the Commission relies to an extent on an ALP which forms, and presumably has always formed, part of the State aid apparatus. It is therefore necessary to examine the existence of such an EU ALP. In this context, it is important first to clarify what the Commission refers to when asserting the existence of such a principle and analyse the basis for this assertion.

The 2016 Notice states, quite bluntly, that the ALP "necessarily" is part of the Commission's assessment of tax measures relating to group companies, regardless of whether or how a Member State has actually implemented it in its national legislation.[4] The Commission argues that it is used to assess whether tax liabilities produce a "reliable approximation of a market-based outcome".[5] However, what makes this passage remarkable is the assertion that this ALP is merely an application of Article 107(1) TFEU, based on the prohibition of unequal fiscal treatment of undertakings in a comparable legal and factual situation.[6] This approach is reiterated in the recent Decisions,[7] and has *grosso modo* been accepted by the General Court in relation to those Decisions.[8] For example, the Commission states in the *Fiat* Decision that the ALP applied in "State aid assessment is not derived from Article 9 of the OECD Model Tax Convention […] but is a general principle of equal treatment in taxation falling within the application of Article 107(1)".[9] Accordingly, this Treaty-derived ALP supposedly binds the Member States.[10] The same exact reasoning can be found in the *Starbucks*,[11] *Apple*,[12] and Belgian Excess Profits Decisions.[13] More importantly however, the Commission argues that a deviation

[4] Commission Notice on the notion of State Aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [2016] OJ C 262/01, para 172
[5] *Ibidem*
[6] *Ibidem*
[7] Commission Decision (EU) 2016/2326 of 21 October 2015 on State Aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to *Fiat* [2016] OJ L 351/1, recital 228; Commission Decision (EU) 2017/502 of 21 October 2015 on State Aid SA.38374 (2014/C ex 2014/NN) implemented by the Netherlands to *Starbucks* [2017] OJ L 83/38, recital 264; Commission Decision (EU) 2017/1283 of 30 August 2016 on State Aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to *Apple* [2017] OJ L 187/1, recitals 255-257; Commission Decision (EU) 2016/1699 of 11 January 2016 on the excess profit exemption State Aid scheme SA.37667 (2015/C) (ex 2015/NN) implemented by Belgium, [2016] OJ L 260/61, recital 150. See also: Fausta Todhe, 'The Rise of an (Autonomous) Arm's Length Principle in EU State Aid Rules' (2019) 18 European State Aid Law Quarterly 249, 251-256
[8] Joined Cases T-760/15 and T-636/16 *The Netherlands and Starbucks Corp. v Commission* ECLI:EU:T:2019:669, paras 162, 168-169; Joined Cases T-755/15 and T-759/15 *Luxembourg and Fiat Chrysler Finance Europe v Commission* ECLI:EU:T:2019:670, paras 150, 161-162; Joined Cases T-778/16 and T-892/16 *Ireland and Apple Sales International and Apple Operation Europe v Commission* ECLI:EU:T:2020:338, paras 214-215, 221
[9] *Fiat* Decision (n 7), recital 228
[10] *Ibidem*
[11] *Starbucks* Decision (n 7), recital 264
[12] *Apple* Decision (n 7), recitals 255-257
[13] Belgium Decision (n 7), recital 150

from the arm's length principle confers a selective advantage.[14] This arguably can be taken to mean, as the Commission,[15] and to a lesser extent the General Court,[16] seem to confirm, that this new ALP forms part of the reference framework under which a measure is to be assessed. The sole foundation for this approach is, according to the Commission, the *Forum 187* judgment.[17] However, this foundation is quite shaky.

a. *Forum 187*

Forum 187 is an interesting case, even though nobody really knew it when it was first decided[18] – its potential laid dormant until the Commission discovered it. However, as will be discussed, it is unclear that the judgment actually says what the Commission has extrapolated from it. It is not a very explicit judgment.[19] The case concerned a Belgian tax regime aimed at coordination centres, which provided that those centres would be taxed at a standard rate determined by the cost-plus method, representing a percentage of their operating costs, excluding certain costs. Additionally, the centres were exempted from property taxes on professional buildings, and most dividends were exempted from withholding taxes.[20] In order for a company to qualify as a coordination centre it had to receive individual authorisation by royal decree, and that authorisation was conditional on it being part of a multinational group, with large capital and reserves, and an even larger annual consolidated turnover.[21] Additionally, the centres could only carry out certain types of activities, not be in the financial sector, and employ at least ten full-time employees in Belgium.[22] The ECJ argued that the tax liability normally borne would be based on the "ordinary tax system based on the difference between profits and outgoings of an undertaking carrying on its activities in conditions of free competition".[23] As such, the Court found that the cost-plus calculations, as well as the numerous exemptions, did indeed confer an advantage,[24] as under normal market conditions the fiscal liability would cover all of those costs.[25] In other words, "normal" taxation did not exclude the exempted charges. In terms of selectivity, the

[14] 2016 Notice (n 4), recital 171
[15] *Ibidem*, recital 172; *Starbucks* Decision (n 7), recital 258; *Fiat* Decision (n 7), recital 222
[16] *Starbucks* (n 8), paras 149-151; *Fiat* (n 8), paras 141-143; *Apple* (n 8), paras 206-208, 212-214
[17] Tony Joris and Wout De Cock, 'Is Belgium and *Forum 187* v. Commission a Suitable Legal Source for an EU At Arm's Length Principle' (2017) 16 European State Aid Law Quarterly 607, 613
[18] *Ibidem*, 608, 615; Jayant Mehta, 'Case Report Joined Cases C-182/03 (Belgium) and C-217/03 (Forum 187) v. Commission' (2007) 6 European State Aid Law Quarterly 732
[19] Peter J Wattel, 'Stateless Income, State Aid and the (Which?) Arm's Length Principle' (2016) 44 INTERTAX 791, 793
[20] Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v Commission* ECLI:EU:C:2006:416, paras 9-13
[21] *Ibidem*, para 6
[22] *Ibidem*
[23] *Ibidem*, para 95
[24] *Ibidem*, paras 95-97, 101-117
[25] Juris and De Cock (n 17), 610

scheme clearly deviated from the reference framework, as the numerous exemptions were derogations from the "ordinary Belgian tax regime".[26] Additionally, the Court held that the regime was also selective in relation to MNEs, as only those active in four or more countries and those with significant capital, reserves, and annual turnover could benefit from it.[27] Thus, selectivity existed on multiple levels, but the finding of selectivity did not relate to the tax liability normally borne.

All in all, *Forum 187* appears to be a relatively straightforward judgment: the recipients' tax burden was clearly reduced, and there was a difference in the treatment of undertakings in a similar legal and factual situation, for example a MNE which did not have the required annual turnover would still risk suffering double taxation.[28] Oddly enough, given the Commission's reliance on the case,[29] the term "arm's length" does not appear in the text of the judgment.[30] Instead, the part of the judgment the Commission relies on simply mentions "conditions of free competition", and their consistent application to all.[31] Belgium had after all included the ALP in the form the cost-plus method, as recommended by the OECD, in the contested measure – the Court merely examined its application,[32] and found it problematic due to deviations from the cost-plus methodology, and the further exemptions.[33] This is obvious due to the ECJ's explicit reference to the contested Decision, where the Commission criticised the application of the specific, OECD-derived TP methodology which was provided for by the national law.[34]

As such, it is submitted that the Court merely said that the ordinary fiscal regime should be applied correctly, and not what it should include.[35] In other words, in a different national legislative and fiscal context, the conditions of free competition referred to would be different. The Commission appears therefore to be rather creative in its interpretation of the Court's wording, as it clearly derives the existence of an arm's length principle from the term "conditions of free

[26] *Forum 187* (n 20), paras 120-121
[27] *Ibidem*, paras 122-123
[28] *Ibidem*, para 125
[29] In fact, the Commission cites it as the sole basis, save for its own recent tax ruling Decisions, to assert that a deviation from the arm's length principle confers a selective advantage See to that effect 2016 Notice (n 4), para 171
[30] Raymond H C Luja, 'Do State Aid Rules Still Allow European Union Member States to Claim Fiscal Sovereignty?' (2016) 25 EC Tax Review 312, 323
[31] *Forum 187* (n 20), paras 96-97
[32] *Ibidem*, paras 94-95
[33] Juris and De Cock (n 17), 614; Saturnina Moreno Gonzalez, 'State Aid and Tax Competition: Comments on the European Commission's Decisions on Transfer Pricing Rulings' (2016) 15 European State Aid Law Quarterly 556, 564
[34] *Forum 187* (n 20), paras 94-96, with reference to recital 95 of Commission Decision 2003/755/EC of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium [2003] OJ L 282/25. See also recital 15 of the Decision.
[35] Wattel, 'Stateless Income' (n 19), 794

competition",[36] even though the term is not clarified or expanded upon at all.[37] As Kyriazis points out, even if we were to accept that the Court was indeed proposing the use of the ALP as a benchmark in general, the context of judgment suggests that it was referring to the OECD one, as it discussed the application of the cost-plus method, and referred approvingly to the Commission's Decision, which also discussed and applied the OECD-derived ALP.[38] In brief, it is unlikely that the Court made the statement the Commission thinks it did in relation to the application of the ALP as a tool to ensure adherence to conditions of free competition *in general*, and even if it did, it made that pronouncement not in relation to an ALP derived from Article 107(1) TFEU, but in relation to the OECD one.[39]

Another element that merits some attention, especially in relation to the tax ruling Decisions, is that the Commission suggests that *Forum 187* can be used to determine the existence of a *selective* advantage.[40] The Commission even included its thoughts on the ALP on the section of the 2016 Notice dealing with selectivity, making it hard to argue that the terms "selective" is merely an adjective used in relation to the advantage allegedly conferred. Instead, it appears that the Commission further extrapolated from *Forum 187* a relationship between selectivity and the ALP.[41] However, as discussed above, the contested measure's selectivity in *Forum 187* did not stem from a departure from conditions of free competition, but from some clear-cut and obvious exemptions, and mainly from the fact that only coordination centres, a status reserved for MNEs with certain characteristics, could benefit from the advantages.[42] Accordingly, the ECJ compared MNEs to MNEs. This is important, as, for the purposes of the contested regime, only MNEs could benefit from the advantages. Additionally, the comparison of MNEs to MNEs reaffirms the point that domestic and multinational groups, and MNEs and standalone companies are not, or at the very least should not be, in principle comparable in relation to the application of the ALP.[43] The selectivity of the measure therefore had

[36] Juris and De Cock (n 17), 614
[37] Luja, 'Do State Aid Rules Still Allow European Union Member States to Claim Fiscal Sovereignty' (n 30), 323
[38] Dimitrios A Kyriazis, 'From Soft Law to Soft Law through Hard Law: The Commission's Approach to the State Aid Assessment of Tax Rulings' (2016) 15 European State Aid Law Quarterly 428, 435
[39] Han Verhagen, 'State Aid and Tax Rulings - An Assessment of the Selectivity Criterion of Article 107(1) in Relation to Recent Commission Transfer Pricing Decisions' (2017) 57 European Taxation 279, 285
[40] 2016 Notice (n 4), para 171; Belgium Decision (n 7), recital 145; *Starbucks* Decision (n 7), recital 258-259; *Fiat* Decision (n 7), recitals 222-223. Emphasis added.
[41] *Ibidem*. See also: Todhe (n 7), 260
[42] *Forum 187* (n 20), paras 120-125. See also: Moreno Gonzalez (n 33), 564
[43] Thomas Jaeger, 'Tax Concessions for Multinationals: In or Out of the Reach of State Aid Law?' (2017) 8 Journal of European Competition Law and Practice 221, 226; Raymond Luja, 'State Aid Benchmarking and Tax Rulings: Can We Keep It Simple' in I Richelle, W Schön, E Traversa (eds) *State Aid Law and Business Taxation* (Springer 2016) 111, 118; Raymond Luja, 'Just a Notion of Aid: How (Not) To Create a Fiscal State Aid Doctrine' (2016) 44 INTERTAX 788, 789; Phedon Nicolaides, 'State

nothing to do with the ALP, either as applied by the Court in the context of Belgian law, or as a general principle.[44] Even if it is accepted that a general statement as to the use of the ALP was made by the Court, this statement would relate exclusively to the notion of advantage, it would have nothing to do with the notion of selectivity.[45] As a final point, it is worth mentioning that in support of the most controversial aspect of its reasoning, namely claiming the existence of an autonomous EU Treaty-derived ALP, the Commission relies again solely on *Forum 187*, citing a completely banal statement, namely that rules relating to tax are not excluded from the scope of Article 107(1) TFEU.[46] It provides no other authority to substantiate this claim.

It is therefore clear that the authority relied on by the Commission, in both its Decisions, and the 2016 Notice in relation to the nature of the ALP as a general principle of State aid law, and as an autonomous principle flowing directly from Article 107(1) TFEU, is far from explicit. In fact, it is arguable that the Commission's reading of *Forum 187* is flawed, given the national fiscal context surrounding the contested measure. Additionally, the Court never utilised the term "arm's length", meaning that the Commission took great liberties in its extrapolation of not only a term but a general principle from the judgment. Finally, even if the Commission's reading regarding the ALP is correct, this ALP would be the OECD one, and most importantly would have nothing to do with the notion of selectivity. In brief, the reliance on this judgment for so many elements of the Notice and the recent Decisions is problematic.[47]

b. The EU ALP in the Commission's Decisions and the General Court's Judgments

Interestingly, both the ALP and any mention of *Forum 187* were absent from the 2014 Draft Notice – in fact they seemingly only became relevant after the investigations that materialised into the recent Decisions were launched.[48] The tax ruling Decisions clearly rely on the ALP, with it being a fundamental part of the

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Aid Rules and Tax Rulings' (2016) 15 European State Aid Law Quarterly 416, 421-423. See also, by analogy: Case C-524/04 *Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue* ECLI:EU:C:2007:161, para 59

[44] Jérôme Monsenego, *Selectivity in State Aid Law and the Methods for the Allocation of the Corporate Tax Base* (Kluwer Law International 2018), 31

[45] Juris and De Cock (n 17), p. 615; Todhe (n 7), 260

[46] *Forum 187* (n 20), para 81; 2016 Notice (n 4), para 172. See also Kyriazis (n 38), 436

[47] Luja, 'Do State Aid Rules Still Allow European Union Member States to Claim Fiscal Sovereignty' (n 30) 322-323; Wattel, 'Stateless Income' (n 19) 793-794; Juris and De Cock (n 17), 613-616; Todhe (n 7), 259-260; Kyriazis (n 38), 434-436; Moreno Gonzalez (n 33), 560-564; Nicolaides, 'State Aid Rules' (n 43), 419-420, 425-426; Anna Gunn, and Joris Luts, 'Tax Rulings, APAs and State Aid: Legal Issues' [2015] EC Tax Review 119, 123; Kyle Richard, 'Are All Tax Rulings State Aid: Examining the European Commission's Recent State Aid Decisions' (2018) 18 Houston Business and Tax Law Journal 1, 26-27; Verhagen (n 39), 285

[48] Juris and De Cock (n 17), 613; Wattel, 'Stateless Income' (n 19), 792

Commission's analysis. More importantly the Decisions claim that this ALP is derived directly from Article 107(1) TFEU.[49] As discussed, and as Moreno Gonzalez explains, the utilisation of the ALP in fiscal State aid cases is nothing new – in fact it is quite reasonable *if* the ALP, any ALP for that matter, is part of the domestic tax system.[50] This was the case with the previous uses of the ALP in the Commission's decisional practice,[51] and the *Forum 187* judgment. If TP rules exist within the domestic fiscal regime, a deviation from them could after all give rise to a finding of aid, if selectivity is established. In the context of those older Decisions, the Commission utilised primarily the OECD Guidelines to assess the ALP methodologies put in place by the Member States in question.[52] Essentially, the Commission seems to have recognised, in those older Decisions, that for the ALP to be used in the realm of State aid, it should first have been introduced in the offending Member States' fiscal landscape, and that even in those cases the peculiarities of the tax systems and the approximate nature of the OECD Guidelines-derived ALP should be taken into account.[53] As such, the Commission's pronouncements in the tax ruling Decisions, and in the 2016 Notice, are far from being a clarification or codification of established legal norms and practices. Indeed, they represent something wholly new.[54]

The General Court, at the time of writing, has delivered four judgments related to those Decisions, three of which actually discuss the ALP,[55] namely *Starbucks*, *Fiat*, and *Apple*. In those three judgments, the EGC somewhat confirmed the Commission's approach, but not necessarily the implications of it.[56] First of all, the Court noted that the ALP, as used by the Commission in the contested

[49] *Fiat* Decision (n 7), recital 228; *Starbucks* Decision (n 7), recital 264; *Apple* Decision (n 7), recitals 255-257; Belgium Decision (n 7), recital 150

[50] Moreno Gonzalez (n 33), 558-560

[51] See for example: Commission Decision 2003/755/EC (n 34), recital 45.

[52] Moreno Gonzalez (n 33), 558-563; Richard (n 47), 23-24

[53] Luc De Broe, 'The State Aid Review Against Aggressive Tax Planning: '*Always Look a Gift Horse in the Mouth*'' (2015) 24 EC Tax Review 290, 292; Luja, 'State Aid Benchmarking' (n 43), 117-118. See also: Edoardo Traversa and Alessandra Flamini, 'Fighting Harmful Tax Competition Through EU State Aid Law: Will the Hardening of Soft Law Suffice' (2015) 14 European State Aid Law Quarterly 323, 330

[54] See for example, and with reference to the different outlook employed: Moreno Gonzalez (n 33), 558-563; Richard (n 47), 23-24

[55] The EGC has also delivered a judgment in relation to the Belgian Excess Profit Scheme, annulling the Commission's Decision on the ground that the contested measure did not actually constitute a scheme within the meaning of Article 1(d) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L 248/9. As such, the Court did not discuss the nature of the Commission's ALP, or any of the constituent elements of State Aid. See to that effect: Joined Cases T-131/16 and T-263/16 *Belgium and Magnetrol International v Commission* ECLI:EU:T:2019:91, paras 57-136. See also: Francois-Guillaume de Lichtervelde, 'The Excess Profit Exemption System Is Not an Aid Scheme: Not the Ruling Expected, but Not the End of the Story' (2019) 18 European State Aid Law Quarterly 382

[56] *Starbucks* (n 8), paras 162, 168-169; *Fiat* (n 8), paras 150, 161-162; *Apple* (n 8), paras 214-215, 221

Decisions, is a "tool",[57] a "benchmark",[58] or a "methodology".[59] Essentially, the Court explained that since tax authorities accepted, in the contested rulings, certain levels of pricing in *Starbucks* and *Fiat*,[60] and of profit attribution in *Apple*,[61] Article 107(1) allows the Commission to determine whether those levels correspond to those that would have been obtained under market conditions, using the ALP as tool for that determination.[62] Thus, the ALP was used by the Commission, in the General Court's eyes, as a benchmark to establish whether an advantage was granted.[63] It is therefore clear that the EU ALP relates to the notion of advantage, and is to be used as a "tool" or "benchmark" for its identification. However, the Court explicitly stated that the ALP can only be used to identify an advantage if the variation between the two compared outcomes goes beyond any inaccuracies inherent in the methodology used to obtain the approximation in question,[64] stressing that the mere identification of methodological errors in the arrangements in not sufficient to prove their advantageous nature.[65] Thus, the Court recognised the approximate nature of the ALP, without however providing any guidance, either as to what constitutes going "beyond" the inaccuracies, or as to what can be considered to be an inherent inaccuracy in this context.

It is important to note that even though the Court accepted the use of the ALP as a "tool", it explicitly rejected the notion that there is a general principle of equal treatment in taxation stemming from Article 107(1), as such an interpretation would give the State aid prohibition "too broad a scope".[66] This approach is reasonable in its conception of equality, as it is worth noting that fiscal norms, such as progressivity of tax or ability to pay, differentiate in the distribution of fiscal burdens regularly, but it is clear from the case law discussed in previous Chapters that not all unequal outcomes flowing from a fiscal norm are, or can be considered to be, State aid.[67] However, in those pronouncements, the Court arguably looked past the very explicit wording of the contested Decisions,[68] which it recognised,[69]

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[57] *Ibidem*, paras 138, 151-152, 157, 163; paras 143-144, 151, 155, 162; paras 214, 216, 225, respectively
[58] *Ibidem*, para 151; paras 143, 261; paras 194-195, 215, respectively
[59] *Ibidem*, para 154; para 146, respectively
[60] *Ibidem*, paras 151-152; paras 143-144 respectively
[61] *Apple* (n 8), paras 214-215
[62] *Starbucks* (n 8), para 151; *Fiat* (n 8), para 143; *Ibidem*, para 214
[63] *Ibidem*, para 151; para 143; para 215 respectively
[64] *Ibidem*, para 152; para 144; para 216 respectively
[65] *Starbucks* (n 8), paras 201, 211; *Apple* (n 8), paras 319, 332-333
[66] *Starbucks* (n 8), para 168; *Fiat* (n 8), para 161
[67] Thomas Jaeger, 'Tax Incentives Under State Aid Law: A Competition Law Perspective' in I Richelle, W Schön, E Traversa (eds) *State Aid Law and Business Taxation* (Springer 2016) 39, 45
[68] In the *Starbucks* and *Fiat* Decisions the Commission explicitly stated that the ALP it was applying was "a general principle of equal treatment in taxation". See to that effect: *Starbucks* Decision (n 7), recital 264; *Fiat* Decision (n 7), recital 228
[69] *Starbucks* (n 8), paras 162, 168; *Fiat* (n 8), paras 150, 161

and accepted the approach the Commission proposed during the hearing.[70] The bolder version of the Commission's approach survives in the 2016 Notice,[71] which however does not mean it has the judicature's blessing,[72] as evidenced by the careful language of the Court in this instance. However, on the basis of *Apple*, it appears that the Court has recognised that this "tool" is indeed a singular one, describing it as "*the* arm's length principle arising from Article 107 TFEU".[73] As such, even though the Commission's ALP seems to have been somewhat relegated from an expression of a general principle to a tool, it still "necessarily" forms part of the Commission's analysis.[74] Thus, based on the Court's approach, it seems that the Commission's ALP itself is a general principle of equal treatment in taxation, which falls within the scope of application of the State aid prohibition – as opposed to an expression of a general principle of equality stemming directly from the wording of Article 107(1).[75]

In brief, the EU ALP was accepted by the General Court, although not necessarily in the form the Commission originally proposed it. The Court, in this context, seems to have tempered the Commission's blunt language. Nonetheless, a singular EU ALP stemming from Article 107 was explicitly recognised as a tool relevant for the application of State aid rules in TP situations, although its provenance and exact form are not clear. Overall, however, the Court's ambivalent language does not help in painting a clear picture, and as a result the nature of the Commission's ALP remains murky. In this context, before analysing the nature and content of the EU ALP, it is worth examining the Court's approach in more detail.

c. The Court's Rationale in Relation to the EU ALP

The EU ALP was in effect recognised by the Court. However, even though it *grosso modo* accepted the Commission's approach, it did not fully endorse it. In order to be able to assess both the assertions over the existence of the EU ALP, and to examine its content and nature, it is important to first examine the Court's rationale. In relation to *Starbucks* and *Fiat* the Court essentially reasoned that where national law makes no distinction between standalone and integrated undertakings, then the profits of integrated undertakings are intended to be taxed as if they had arisen from transactions carried out at market prices.[76] In *Apple*, the same reasoning was applied, in relation to the attribution of profits between the branch of a non-

[70] *Ibidem*, para 138; para 130, respectively
[71] The Notice states that the ALP is "an application of Article 107(1) […] which prohibits unequal treatment in taxation". See to that effect: 2016 Notice (n 4), para 172
[72] Luja, 'Just a Notion of Aid' (n 43), 788
[73] *Apple* (n 8), para 221, emphasis added. A singular, definite article was also used in the French version of the judgment.
[74] *Starbucks* (n 8), para 162; *Fiat* (n 8), para 150; *Apple* (n 8), para 224
[75] *Ibidem*, paras 161-163, 168-169; paras 149-151, 161-162, respectively
[76] *Ibidem*, para 149; para 141 respectively

resident undertaking and a standalone one operating in market conditions.[77] Essentially, the Court argued that since the relevant domestic tax systems made no (formal) distinction between groups and standalones or residents and non-residents in relation to taxation, the Commission was entitled to use the ALP as tool stemming from a general principle of equal treatment to examine the outcomes endorsed in the tax rulings. This would explain why the EU ALP applies not simply to transfer prices, but also to taxable profits, which arguably somewhat differentiates it from the OECD, fiscal ALP.

In effect, the Court introduced the rationale of the ALP into the logic of the national tax systems, regardless of whether it formed part of said systems. In *Apple* for example, the Court (and the Commission) "discovered" the Authorised OCED Approach in the logic of the national tax regime, based on some "overlap", despite the OECD ALP not being introduced into Irish law until after the contested rulings were granted.[78] This reasoning is based on *Forum 187*, as the Court states,[79] which is arguably problematic, as in *Forum 187* the ECJ applied the ALP *already present* in the contested Belgian tax measure,[80] whereas in the cases at hand the ALP in question is one stemming from Article 107(1), and its application disregards, or at the very least departs from national law.[81] Thus, the reasoning clearly departs from *Forum 187*.

This reasoning sits uncomfortably next to the explicit statements of the Court that the Commission cannot determine what constitutes "'normal' taxation while disregarding national rules of taxation".[82] This is because "normal" taxation, which defines the fiscal burdens normally borne and as such is the basis of the existence of an advantage,[83] needs to be determined based on national tax laws, as they are the base of comparison. As the Court recognises, the existence of an advantage can only ever by established by reference to national laws.[84] To reconcile this well-established line of case law with the Commission's approach, the Court at this point essentially claimed that national tax law, by not formally distinguishing between the

[77] *Apple* (n 8), paras 206-208, 212
[78] *Ibidem*, paras 217-218, 233-240
[79] *Starbucks* (n 8), para 150; *Fiat* (n 8), para 142; *Apple* (n 8), para 213
[80] *Forum 187* (n 20), paras 94-96, with reference to recital 95 of Commission Decision 2003/755/EC (n 34). See also: recital 15 of the Decision; Juris and De Cock (n 17), 614; Moreno Gonzalez (n 33), 564
[81] *Starbucks* (n 8), para 161; *Fiat* (n 8), para 149; *Apple* (n 8), para 217
[82] *Ibidem*, para 159; para 112; para 223 respectively
[83] Case C-387/92 *Banco Exterior de España v Ayuntamiento de Valencia* ECLI:EU:C:1994:100, para 13; Case C-6/97 *Italy v Commission* ECLI:EU:C:1999:251, para 15; Case C-74/16 *Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe* ECLI:EU:C:2017:496, paras 65-66; Joined Cases C-399/10 P and C-401/10 P *Bouygues and Bouygues Télécom v Commission and Others* and *Commission v France and Others* ECLIEU:C:2013:175, para 101; Case C-522/13 *Ministerio de Defensa and Navantia SA v Concello de Ferrol* ECLI:EU:C:2014:2262, paras 21-22; Case C-88/03 *Portugal v Commission* ECLI:EU:C:2006:511, para 56
[84] *Starbucks* (n 8), paras 146, 159; *Fiat* (n 8), paras 113, 157; *Apple* (n 8), paras 145, 224

compared groups of undertakings, implicitly recognises that "normal" taxation is taxation in line with market conditions, or in other words the Article 107(1)-derived ALP.[85] In effect therefore, under that reasoning, the Court endorses the view that the ALP implicitly is part of the national tax system, and therefore binding on the Member States concerned, meaning that the Commission can lawfully apply it, and use it to determine the existence of an advantage. In doing so, however, the Court seems to not be relying solely on national law *in relation to which* ALP is to be used.[86] This is particularly important, as the ALP is supposed to be used as the benchmark to compare the factual with the counterfactual (the "normal" application of tax rules).[87] This means that the benchmark used to define "normal" taxation is external to the tax system.

Additionally, the line of reasoning finding that the ALP is implicitly part of the national tax system is based on the determination of the objectives of the systems under investigation, which the Commission, and the Court, interpret not necessarily in reference to the systems themselves. Rather, in effect they discover an objective which is not explicitly part of the system, but implicitly based on a lack of formal differentiation,[88] or on overlap and similarities with an ALP analysis.[89] In practical terms therefore, once the ALP has been assumed into the national tax system it is deemed to be part of what makes up "normal" taxation in line and by reference to the national tax system.[90] The Court's reasoning, as well as that of the Commission in the Decisions discussed above, mean that the ALP derived from Article 107(1) can be applied into national tax systems, subject to it being in line with the systems' implicit logic. Therefore, the Commission, with the blessings of the General Court, develops an abstract understanding of the given national system, possibly detached from the logics of the system, in which an equally abstract ALP, detached from international practice, is applied.[91]

It is submitted that based on this assumptive determination of systemic objectives, this reasoning can easily be circumvented by "regulatory technique", as all it would take for it to collapse would be a formal distinction in national tax law between the compared groups of undertakings, which in relation to residents and non-residents, as in the case of *Apple*, would not be alien to the logic of tax law.[92]

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[85] *Ibidem*, paras 159-160; paras 113, 139, 141; para 224, respectively
[86] *Ibidem*, paras 161-164; paras 149-152; paras 217-220, respectively
[87] *Ibidem*, para 149; para 141; paras 203-204, 212, respectively
[88] *Ibidem*, paras 149, 153; paras 141, 145, respectively
[89] *Apple* (n 8), paras 208-211, 218-220, 239-240
[90] *Starbucks* (n 8), para 171
[91] Jaeger, 'Tax Concessions' (n 43), 227
[92] See for example: Case C-87/13 *Staatssecretaris van Financiën v X* ECLI:EU:C:2014:2459, para 27; Case C-39/10 *Commission v Estonia* ECLI:EU:C:2012:282, para 51; Case C-562/07 *Commission v Spain* ECLI:EU:C:2009:614, para 46; Case C-282/07 *Belgian State - SPF Finances v Truck Center SA* ECLI:EU:C:2008:762, para 38; Case C-311/97 *Royal Bank of Scotland plc v Elliniko Dimo*sio

The resolution proposed by the Court also leaves unanswered the question of potential friction or even conflict between national TP rules and ALP approaches, and the Commission's one, especially given the lack of guidance on the contents of the latter. Equally, it is unclear whether the Commission's ALP would still apply if a Member State opts for another method to determine the profit allocation of MNEs, or explicitly chooses to not have a profit allocation method at all. That choice would constitute "normal" taxation, meaning that if the ALP is explicitly not part of it, the Court's reasoning would preclude the Commission's ALP from applying. This outlook is reinforced by the *Apple* judgment, where the Court rejected the notion that there is an obligation on Member States to apply the Article 107(1)-derived ALP "horizontally and in all areas of their national tax law",[93] in effect meaning that there needs to be an at least implicit logical connection between the ALP and the examined reference framework.

This reading is in line with the allocation of competences in direct taxation and with the right of Member States to designate the bases of assessment and tax burdens applicable,[94] and determine what constitutes "normal" taxation, based on which the existence of an advantage is to be ascertained.[95] In effect therefore, the Court's "nationalisation" of the Commission's ALP, by identifying its existence in the lack of a formal distinction as a means to infer its applicability in national law, must by extension mean that a formal distinction, or any explicit reference to other profit allocation methods, make the ALP non-existent, even implicitly, in the tax system, and therefore not applicable. In this context, it could even be claimed that it is the regulatory technique, or lack thereof, of the systems and TP regimes examined that makes the ALP the appropriate benchmark applicable. Given that the EU ALP appears to at least implicitly form part of the reference framework, arguably the inherent logic of this approach contradicts *Gibraltar*,[96] and *Dirk Andres*.[97]

ECLI:EU:C:1999:216, paras 27-29. See also: Mattias Dahlberg, *Direct Taxation in Relation to the Freedom of Establishment and the Free Movement of Capital* (Kluwer Law International 2005), 104-107; Wolfgang Schön, 'Neutrality and Territoriality – Competing or Converging Concepts in European Tax Law?' [2015] IBFD Bulletin for International Taxation 271, 282-283. See also, in relation to the distinction between integrated and non-integrated undertakings: *Thin Cap* (n 43), para 59.

[93] *Apple* (n 8), para 221

[94] Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, para 97; *Starbucks* (n 8), para 159; *Fiat* (n 8), paras 106-107;*Apple* (n 8), paras 222-223

[95] *Banco Exterior* (n 83), para 13; *Italy v Commission* (n 83), para 15; *Congregación de Escuelas Pías* (n 83), paras 65-66; *Bouygues* (n 83), para 101; *Concello de Ferrol* (n 83), paras 21-22; *Portugal v Commission* (n 83), para 56; *Starbucks* (n 8), paras 146, 159; *Fiat* (n 8), paras 113, 157; *Apple* (n 8), paras 145, 224

[96] *Gibraltar* (n 94), paras 87, 92-93. See also Case C-487/06 P *British Aggregates Association v Commission* ECLI:EU:C:2008:757, paras 85, 89

[97] Case C-203/16 P *Dirk Andres (faillite Heitkamp BauHolding) v Commission* ECLI:EU:C:2018:505, para 92; Case C-208/16 P *Germany v Commission* ECLI:EU:C:2018:506, para 89; Case C-209/16 P *Germany v Commission* ECLI:EU:C:2018:507, para 87; Case C-219/16 P *Lowell Financial Services v*

It is also arguable that the Court's reasoning is in effect circular, or "assuming the conclusion". This is because the Court in essence argues that the ALP necessarily forms part of the Commission's analysis because of the system's objective of taxing standalone and integrated undertakings, or resident and non-resident ones, in a similar manner. At the same time, this objective is formulated based on an ALP logic of taxing profits as if they had arisen in market conditions. In other words, according to the Court, the Commission's ALP applies, independently of whether it exists in national law, because an ALP logic implicitly exists, and is therefore applicable, in national tax law. Assuming that the system's objective requires an approximation of "market-based outcomes" in terms of chargeable income,[98] in effect translates into an assumption that the ALP applies to ensure that such outcomes are possible and that the objective is met, which in turn means that the Commission can apply its own ALP to verify the application of the implied ALP. In one sentence therefore, the ALP applies because it has to for the system's objective to make sense, and that objective is what it is because the ALP is implicitly part of the system.

It is clear, in brief, that the Court's rationalisation of the EU ALP is not very straightforward. Essentially, it relies on the lack of formal distinctions in the national systems, in order to imply the EU ALP into those systems. In doing so however, the Court in effect interferes, and allows the Commission's EU ALP to interfere, with the definition of "normal" taxation. By extension, this rationale also means that the reference framework is, in part at least, extra-systemic. Beyond those issues, the implicit assumption of the EU ALP into national tax law can be circumvented by regulatory technique. Overall, the reasoning is problematic in multiple ways.

d. The Material Content of the EU ALP

The previous two sections discussed the Court's reasoning in the *Starbucks*, *Fiat*, and *Apple* judgments, as well as that of the Commission in relation to the Decisions, and argued that the authority relied upon and the reasoning employed are far from rock solid. In the context of this discussion it is nonetheless possible to conclude that the ALP arising from Article 107(1) exists in and of itself, and can be applied in State aid cases. This section will discuss the content of the EU ALP.

Both the nature and the material content of the ALP remain unclear, which is problematic given the approximate nature of the ALP,[99] and, as will be discussed

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Commission ECLI:EU:C:2018:508, para 94. See also: Phedon Nicolaides, 'The Definition of the Reference Tax System Is Still a Puzzle' (2018) 17 European State Aid Law Quarterly 419, 422

[98] *Starbucks* (n 8), paras 140, 152; *Fiat* (n 8), paras 132, 144; *Apple* (n 8), paras 198, 216

[99] OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (OECD, 2010), paras 1.13, 3.55; Lorraine Eden, *Taxing Multinationals: Transfer Pricing and Corporate Income Taxation in North America* (University of Toronto Press 1998), 593; Hagen Luckhaupt, Michael Overesch, and Ulrich Schreiber, 'The OECD Approach to Transfer Pricing: A Critical Assessment and Proposal' in Wolfgang Schön and Kai A Konrad (eds) *Fundamentals of International Transfer Pricing in Law and Economics* (Springer 2012), 92

below, the burden and standard of proof attached to its analysis. In terms of the ALP's content, the Court is happy to merely state that the ALP is a "tool for checking that intra-group transactions are remunerated as though they had been negotiated between independent undertakings".[100] In other words, the EU ALP is merely the base conceptual idea of *an* ALP, without any further guidance, and without being endowed with any specific content. As discussed above, even the terminology employed by the Court in relation to the nature of the EU ALP is not clear,[101] making the determination of its content exceedingly difficult. The Court recognises the approximate nature of the ALP, by accepting that an advantage can only arise if the variation between the comparables goes beyond any inaccuracies inherent in the methodology used,[102] or in other words beyond acceptable differences inherent in the approximate nature of the ALP. At the same time, the Court's reasoning suggests that a TP arrangement will be valid only if it leads to a "reliable approximation of a market-based outcome",[103] which is in effect equated to an arm's length outcome.[104] However, neither the Court nor the Commission provide a definition of those terms, or even any guidance as to what constitutes such a reliable approximation.

The identification of any objective criteria from the Commission's practice or the Court's case law is practically impossible, given the former's case-by-case approach.[105] Given the lack of consistency inherent in the ALP methodologies discussed in Part IV of the Tax Rulings, the Arm's Length Principle, and the Commission's Decisions Chapter, and the differences between national TP regimes, this creates a significant issue in relation to the nature and content of the arrangements which can be caught by the EU's ALP. It is unclear therefore whether a national approach is actually in line with the EU's approach, since we are dealing with an independent EU ALP and the associated "market-based outcome" standard, neither of which have material content, despite appearing to be autonomous. This outlook is also supported by the 2016 Notice.[106] A further problem in this context is that the ALP is in effect part of the reference framework, meaning that without a defined content it becomes nigh impossible to evaluate what the standard rules, and by extension any derogations from them, actually are.

[100] *Starbucks* (n 8), para 157; *Fiat* (n 8), para 155
[101] *Ibidem*, paras 138, 151-152, 154, 157, 163; paras 143-144, 146, 151, 155, 261, respectively; *Apple* (n 8), paras 194-195, 214-216, 225
[102] *Ibidem*, paras 152, 196, 199; paras 144, 149, 204; para 216, respectively
[103] *Ibidem*, paras 193, 196; paras 176, 204; paras 198, 315, 319, respectively
[104] *Ibidem*, paras 201-202, 213; paras 218, 292; paras 354, 486, respectively
[105] Jaeger, 'Tax Concessions' (n 43), 229
[106] 2016 Notice (n 4), paras 171-174

The Notice,[107] Decisions,[108] and the judgments suggest that the OECD's ALP approach, as it emerges from the Guidelines, can be used as guidance, but is not in and of itself binding.[109] The Commission can however choose to rely on the OECD approach.[110] In fact, the Commission still seems to base its understanding of its brand new ALP on the OECD's outlook, stating that in the assessment of the ALP "inherent in Article 107(1)", guidance can be derived from the OECD Guidelines,[111] complicating the distinction, maintained by both the Commission[112] and the Court,[113] between the two ALPs. Adding to the confusion between the two, in name at least, different ALPs, the Commission further states that if the Guidelines are followed in full, it is "unlikely" that a measure will be found to confer State aid.[114] Despite the similarities, *de facto*, of the Commission's approach and that contained in the OECD Guidelines,[115] as per the Court, those Guidelines can only have "practical significance" in the interpretation of TP issues, and are not binding.[116] For example, in the *Starbucks* judgment, when discussing the choice of the tested party for the purposes of the ALP analysis, the Court explained that the Guidelines are merely a guidance document which do not in and of themselves create obligations, as they "do not lay down a strict rule".[117] At the same time, the Court argued against the Commission's insistence on employing the CUP method instead of the TNMM based, *inter alia*, on the OECD approach.[118] However, neither the Commission's OECD-centric analysis,[119] nor the Court's observation of the potential significance

[107] *Ibidem*, para 173
[108] See for example: *Fiat* Decision (n 7), recital 86; *Starbucks* Decision (n 7), recital 64; *Apple* Decision (n 7), recitals 79-82; Belgium Decision (n 7), recital 54; Commission Decision (EU) 2018/859 of 4 October 2017 on State Aid SA.38944 (2014/C) (ex 2014/NN) implemented by Luxembourg to Amazon [2018] OJ L 153/1, recital 246
[109] *Starbucks* (n 8), paras 154-156; *Fiat* (n 8), paras 146-148; *Apple* (n 8), paras 234-240
[110] *Apple* (n 8), paras 234-240
[111] 2016 Notice (n 4), para 173
[112] *Ibidem*, paras 171-173
[113] *Starbucks* (n 8), paras 161-166; *Fiat* (n 8), paras 149-155; *Apple* (n 8), paras 235-240
[114] 2016 Notice (n 4), para 173
[115] See for example: *Fiat* Decision (n 7), recital 87; *Starbucks* Decision (n 7), recital 66; *Apple* Decision (n 7), recital 79
[116] *Starbucks* (n 8), para 155; *Fiat* (n 8), para 147; *Apple* (n 8), para 237
[117] *Starbucks* (n 8), paras 433-434
[118] *Ibidem*, paras 214-215
[119] See for example: *Ibidem*, paras 185, 256, 335, 424; *Fiat* (n 8), paras 176, 296; *Apple* (n 8), paras 323-325, 330, 363; *Amazon* Decision (n 108), recitals 244-268, 278-279, 403, 428, 430; State Aid – Luxembourg – State Aid SA.50400 (2019/NN-2) – Possible State Aid in favour of Huhtamäki – Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union [2019] OJ C 161/3, recitals 53-59, 95, 103; State Aid – Netherlands – State Aid SA.46470 (2017/NN) – Netherlands Possible State Aid in favour of Inter IKEA – Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union C/2017/8753 [2018] OJ C 121/30, recitals 76-85, 115-117, 165-166; State Aid – Netherlands – State Aid SA.51284 (2018/NN) – Netherlands Possible State Aid in favour of Nike – Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union [2019] OJ C226/31, recitals 52-59, 84-86, 100, 103, 104-107

of the OECD Guidelines in its own analysis,[120] can be seen as endowing the EU ALP with material content, due to the separation and explicit distinction between the two ALPs, and the fact that the OECD Guidelines are explicitly non-binding.

Equally, the Commission's ALP analysis was either not conducted based on the national TP framework and rules at all,[121] or it only looked at the base elements of the national law and practice, transposing, based on conceptual overlaps, onto national law the OECD approach, while still maintaining its distinction from its own ALP.[122] In other words, the EU ALP, and its content, supersede those of national TP rules. For example, in the *Starbucks* judgment, the Court stressed the difference between a purely fiscal ALP (which would be the one enacted under national law, as part of the tax regime), and the one employed by the Commission for State aid assessment.[123] The Court also recognised that the Commission may choose any methodology it deems appropriate, which can include methodologies external to the tax system.[124] Therefore, based on the Commission's analysis, and the Court's acceptance of it, the EU ALP can analytically "borrow" from the OECD approach, but the OECD approach does not give it material content – it can merely provide guidance, but no certainty. In the same vein, it would be conceptually hard to infer the OECD ALP into Article 107(1), given that the latter significantly predates the former.[125] Additionally, even if the OECD Guidelines could be taken as a source of content for the EU ALP, it is unclear which version of them ought to be used as a point of reference,[126] and whether those Guidelines acting as a source are to be conceived of as static or dynamic.[127] At the same time, national rules and frameworks appear to be irrelevant in endowing the EU ALP with content, both based on the Court's approach, and on the inherent logic of the EU ALP as a necessarily applicable element of the Commission's assessment which can go beyond the intricacies and limitations of any domestic TP rules. In effect therefore, the ALP assessment in the Decisions and the judgments is detached from the rationale of national law, and not grounded in international practice.[128]

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[120] See for example: *Fiat* (n 8), paras 219-223
[121] *Starbucks* (n 8), paras 161-163, 171; *Fiat* (n 8), paras 149-151, 159
[122] *Apple* (n 8), paras 235, 239-240
[123] *Starbucks* (n 8), para 213
[124] *Ibidem*, paras 154, 172
[125] Article 107(1) TFEU has remained unchanged since its introduction in the Treaty of Rome (see Treaty Establishing the European Community, 25 March 1957, Article 92), while the OECD was not established until 1961, and produced its first TP Guidelines in 1995, having previously published a report on TP and MNEs in 1979.
[126] See for example: *Starbucks* (n 8), paras 243-244. See also: Moreno Gonzalez (n 33), 570.
[127] Raymond H C Luja, 'General Report' in José Luís da Cruz Vilaça, Carlos Botelho Moniz, Rita Leandro Vasconcelos and Alberto Saavedra (eds) *Taxation, State Aid and Distortions of Competition* (XXVIII FIDE Congress, Congress Proceedings Vol. 2, 2018), 80-81
[128] Jaeger, 'Tax Concessions' (n 43), 227

The EU ALP therefore lacks substance. It is clear that the OECD's approach cannot bind the Commission, and the domestic approaches are superseded by the EU ALP, meaning that neither can act as a source of material content for the EU ALP, leaving us with an abstract ALP, not moored in any concrete, objective criteria. The lack of material content can lead to significant legal uncertainty, as it is in effect impossible for taxpayers and tax authorities to know *ex ante* which fiscal arrangements will be in line with the EU ALP, and which ones will invite the Commission's scrutiny. At the same time, the notification by tax authorities of tax rulings that may potentially confer aid, which due to the lack of legal certainty is arguably most of them, can stretch the Commission's resources to a breaking point, due to a combination of the sheer number of potentially problematic arrangements and the intensity of the required review.[129]

e. The Nature of the EU ALP

It is clear that the EU ALP is nominally autonomous. As such, it supersedes national rules, and is separate and different in content from the OECD approach. This means that in terms of its content it is not based on either national rules or the OECD TP Guidelines. As a result, it lacks any clearly defined content, making its consistent application tricky if not impossible. To further complicate matters, the EU ALP's nature is also shrouded in mystery. If the Commission's claim of the nature of its newly discovered ALP as a general principle of equal treatment in taxation, which falls within the scope of application of the State aid prohibition, is to be accepted, this ALP is not fiscal, but rather rooted in competition law,[130] or internal market law. This is because the notion of equality of treatment, or maintaining a level playing field can be seen as an imperative to protect free competition and ensure non-discrimination in the internal market.[131] Such a reading of it would explain to an extent the similar approach in relation to comparability between State aid law and the fundamental freedoms, as they would be based on a similar consideration of equal treatment.[132]

It is important to bear in mind that the equality principle inherent in Article 107(1) TEFU refers to equality of *treatment*, not outcomes.[133] This is because not all differential fiscal outcomes stemming from the application of general tax rules are discriminatory or selective,[134] and because State aid is not concerned with

[129] Luja, 'Just a Notion of Aid' (n 43), 790
[130] Todhe (n 7), 258; Wattel, 'Stateless Income' (n 19), 792
[131] Wattel, 'Stateless Income' (n 19), 792
[132] Rita Szudoczky, 'Convergence of the Analysis of National Tax Measures under the EU State Aid Rules and the Fundamental Freedoms' (2016) 15 European State Aid Law Quarterly 357, 363–364. See also: Cristina Romariz, 'Revisiting Material Selectivity in EU State Aid Law Or "The Ghost of Yet-To-Come' (2014) 13 European State Aid Law Quarterly 39, 48
[133] Michael Lang, 'State Aid and Taxation: Selectivity and Comparability Analysis' in I Richelle, W Schön, E Traversa (eds) *State Aid Law and Business Taxation* (Springer 2016) 27, 36
[134] Jaeger, 'Tax Incentives' (n 67), 45

secondary selective effects.[135] The discrimination-linked approach to State aid discussed in the Selectivity Chapter also supports this conclusion, as does the very notion of "discrimination", especially if we consider that State aid is a prohibition of, *inter alia*, unequal treatment, and not a requirement for equal treatment.[136] It is obvious for example that the effect an undertaking's size has on its effective tax rate,[137] even though it produces different outcomes flowing from the application of the general tax regime, cannot be deemed to be either selective, or discriminatory. This interpretation in relation to the limits of the notion of equality is corroborated by the Court's rejection of the existence of a general principle of equality in taxation stemming from Article 107(1) TFEU.[138] It is therefore clear that the rationale and scope of fiscal State aid do not prohibit unequal or different outcomes, but prohibit unequal treatment. Transposing an equality of outcome principle on fiscal aid would therefore be contrary to the base concepts of maintaining a level playing field and normal conditions of competition, and would go far beyond the limits of the scope of the State aid prohibition.

As is clear from the discussion of the Court's interpretation of the EU ALP, its function is linked with the notion of advantage. In effect, therefore this goal can arguably be linked to the insistence on systemically achieving the best possible approximation of market-based outcomes, in a similar manner to the MEOP. It is worth noting that in the first round of opening Decisions, a logic inspired by the MEOP was used in relation to the ALP,[139] arguably as a way to introduce the latter in the logic of State aid.[140] In fact, the logic of the ALP is closely linked to that the

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[135] 2016 Notice (n 4), paras 115-116; Joined cases C-52/97, C-53/97 and C-54/97 *Epifanio Viscido, Mauro Scandella and Others and Massimiliano Terragnolo and Others v Ente Poste Italiane* Opinion of AG Jacobs ECLI:EU:C:1998:78, para 16

[136] Lang (n 133), 36

[137] Francisco J. Delgado, Elena Fernández-Rodríguez, Antonio Martínez-Arias, 'Corporation Effective Tax Rates and Company Size: Evidence from Germany' (2018) 31 Economic Research 2081, 2096; Francisco J. Delgado, Elena Fernandez-Rodriguez, Antonio Martinez-Arias, 'Effective Tax Rates in Corporate Taxation: A Quantile Regression for the EU' (2014) 25 Engineering Economics 487, 489-492; Anastasia Kraft, 'What Really Affects German Firms' Effective Tax Rate?' (2014) 5 International Journal of Financial Research 1, 16-17

[138] *Starbucks* (n 8), paras 168; *Fiat* (n 8), para 161

[139] State Aid – Luxembourg – State Aid SA.38944 (2014/C) (2014/NN) – Alleged aid to Amazon – Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union [2015] OJ C 44/13, recitals 53, 55, 61-63; State Aid – Ireland – State Aid SA.38373 (2014/C) (ex 2014/NN) – Alleged aid to Apple – Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union [2014] OJ C 369/22, recitals 53-58; State Aid – Netherlands State Aid SA.38374 (2014/C) (ex 2014/NN) (ex 2014/CP) – Alleged aid to Starbucks – Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union [2014] OJ C 460/11, recitals 74-77; State Aid – Luxembourg – State Aid SA.38375 (2014/C) (ex 2014/NN) – Alleged aid to FFT – Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union [2014] OJ C 369/37, recitals 60-62

[140] Gunn and Luts (n 47), 123; Moreno Gonzalez (n 33), 562. See also: Werner Haslehner, 'Double Taxation Relief, Transfer Pricing Adjustments and State Aid Law' in I Richelle, W Schön, E Traversa (eds) *State Aid Law and Business Taxation* (Springer 2016) 133, 154-155

MEOP,[141] especially in relation to approximating market prices. In this context, it could be argued that the competition nature of the EU ALP relates to its function as a tool which oversees the application of national and international tax norms. In other words, it can add substance to the advantage criterion in relation to TP cases, again in a similar manner to the MEOP's function, as discussed in the Advantage Chapter. However, even though the MEOP can arguably be understood as a requirement to keep undertakings at arm's length, its application in this context does not make sense, due to the character of taxation.[142]

Additionally, the explicit lack of clarity on the EU ALP's substantive material content, which at the same time supersedes national rules and is not bound by the OECD approach, means that such a reading of its function would be incomplete. It is certainly a tool which can oversee the application of national and international rules in the context of TP, but at the same time it is the benchmark upon which the advantage analysis is to be conducted, going beyond national and international rules, and implying ill-defined content in them. It is therefore at the same time both a competition tool, and a fiscal one. In the same vein, it is important to note that the logic of the notion of advantage, which is objective and unambiguous, does not sit comfortably alongside the concept of the ALP, which is necessarily subjective and approximate.[143] This could explain why the ALP is yielded in a manner similar to the MEOP, especially in its early conception.[144] Arguably, some of the other issues, which will be further discussed below, stemming from the Decisions and the judgments, such as the merging of selectivity and advantage, and the high burden and standard of proof relate to the need for the EU ALP to fit into the rationale of the notion of advantage.

It is worth noting that in the recent ALP Decisions where the independence of the EU's ALP was asserted, the Commission acknowledged that the "authoritative statement" of the ALP is to be found in the OECD Convention,[145] which contains a fiscal ALP – not a competition law one.[146] It is clear therefore that even as the Commission asserts the existence of an equality-oriented ALP inherent in the logic of Article 107(1), it still heavily relies on the OECD formulation and methodology to

[141] *Apple* (n 8), paras 436-437; *Apple* Decision (n 7), recitals 146, 150, 360
[142] Peter J Wattel, 'The Cat and the Pigeons: Some General Comments on (TP) Tax Rulings and State Aid After the Starbucks and Fiat Decisions' in I Richelle, W Schön, E Traversa (eds) *State Aid Law and Business Taxation* (Springer 2016) 185, 186; Gunn and Luts (n 47), 123-124
[143] Monsenego (n 44), 136-144
[144] Moreno Gonzalez (n 33), 562-563; Richard (n 47), 27-28
[145] *Fiat* Decision (n 7), recital 86; *Starbucks* Decision (n 7), recital 64; *Apple* Decision (n 7), recitals 79-82; Belgium Decision (n 7), recital 54; Amazon Decision (n 108), recital 246
[146] As Wattel explains, a fiscal ALP would be primarily concerned with maintaining conditions of free competition, as opposed a fiscal one, which would be geared towards tax base protection, "fair share" principles, and the allocation of taxing rights between tax jurisdictions. See to that effect Wattel, 'Stateless Income' (n 19), 794

provide content to its analysis.[147] Therefore, the EU ALP would seem to have a dual nature. Essentially, by creating an independent EU principle and then tying it to the OECD methodology, the Commission in effect creates a tacit obligation for Member States to fully introduce and apply the Guidelines to their domestic system.[148] This is somewhat reasonable from a practical standpoint, given the lack of any guidance or material content on this EU ALP concept, especially in light of the substantial difficulties in trying to allocate the correct amount of profit to related entities operating in a globally unharmonised fiscal environment.[149] At the same time however it exposes significant logical problems both in relation to the claim of independence from the OECD, and in relation to the nature of the ALP as a competition tool. This raises the valid question of whether we are dealing with a fiscal tool geared to apply to competition law cases, or a competition law tool geared to apply to tax law cases.

The dual nature of the ALP is also problematic due to the apparently different effects the two readings, fiscal and competition, would have – the former, under EU direct tax law, essentially prohibits Member States from reallocating profits in their own jurisdiction, while the latter prevents underallocation in their own jurisdiction.[150] Additionally, if this duality is accepted, the strictness and at the same time non-committal[151] nature of the Notice's language suggests that the Commission can invoke this principle to scrutinise a fiscally appropriate approximation on competition law grounds.[152] This results from the different focus and nature of the two ALPs.[153] This would in effect mean that the Commission would be in charge of interpreting its own creation in any way it sees fit. Thus, beyond the tacit obligation to adopt the OECD Guidelines, the Member States would have to *interpret and apply* those rules in a particular way, as endorsed by the Commission, or fall foul of the State aid prohibition.[154] This is reinforced by the distinction drawn by the General Court in *Starbucks*, between an arrangement being sound under competition law but not under tax law.[155] Based on the logic of the EU ALP, there is

[147] See for example: *Starbucks* (n 8), paras 185, 256, 335, 424; *Fiat* (n 8), paras 176, 296; *Apple* (n 8), paras 323-325, 330, 363; Amazon Decision (n 108), recitals 244-268, 278-279, 403, 428, 430; Huhtamäki Opening Decision (n 119), recitals 53-59, 95, 103; IKEA Opening Decision (n 119), recitals 76-85, 115-117, 165-166; Nike Opening Decision (n 119), recitals 52-59, 84-86, 100, 103, 104-107

[148] Moreno Gonzalez (n 33), 564

[149] Todhe (n 7), 256

[150] Wattel, 'Stateless Income' (n 19) 795; Svitlana Buriak and Ivan Lazarov, 'Between State Aid and the Fundamental Freedoms: The Arm's Length Principle and EU Law' (2019) 56 Common Market Law Review 905, 940-941

[151] Note the use of the words "may" and "unlikely" in paragraph 173 of 2016 Notice (n 4), in relation to the use and usefulness of OECD methods.

[152] Moreno Gonzalez (n 33), 564; Wattel, 'Stateless Income' (n 19), 792

[153] Wattel, 'Stateless Income' (n 19), 794

[154] Raymond H C Luja, "Will the EU's State Aid Regime Survive BEPS?" [2015] British Tax Review 389, 389-390

[155] *Starbucks* (n 8), para 213

no reason why this reasoning could not apply in reverse.[156] This issue is compounded by the fact that there is no agreement in any guidance documents relating to the well-established international practice as to what constitutes the most appropriate point of an arm's length range,[157] meaning that even in the context of decades of practice, a "correct" point, or a clear-cut yes or no answer in relation to the conferral of an advantage does not necessarily exist.[158] This lack of material content and guidance, coupled with the fact that the EU ALP supersedes national regimes, could arguably make the Commission a Union-wide national TP rule supervision authority,[159] and significantly blur the lines between tax policy and State aid, thus going beyond the limits of its competences, and beyond the objectives of State aid.[160]

In effect, it is clear that the primary function of the EU ALP, regardless of whether it is a competition law or tax law principle, relates to the notion of advantage. Beyond this however, its actual nature remains unclear. It is imperative that the relationship of the EU ALP to on the one hand national TP or other profit allocation regimes, and on the other international practice is clarified. In the same vein, the material content of the EU ALP must also be substantiated. As discussed in the previous section, the EU ALP is independent from national and (other) international ALP models. It supersedes national rules, and is different from the OECD practice, meaning it lacks any clearly defined material content. In practical terms, the Commission is free to interpret it as it sees fit, due to the lack of any substantive guidance on its application. The distinct lack of clarity in relation to both its content and nature are problematic, in terms of its application, creating significant legal uncertainty. The lack of clearly defined content makes the determination of the EU ALP's nature difficult, and vice versa. Given that it is after all a necessary element of the Commission's assessment and a general principle, this lack of legal certainty both for taxpayers and for tax authorities is in itself problematic. This can be particularly troublesome for undertakings, as the tax environment and fiscal certainty in a given jurisdiction greatly affect their business choices. Equally, this lack of clarity and certainty in relation to the EU ALP's characteristics means that its theoretical and practical limits are impossible to divine, thus calling into question its very foundational logic and constitutional basis. In this context, it is necessary to examine the implications of the ill-defined EU ALP on tax policy and fiscal sovereignty.

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[156] Wattel, 'Stateless Income' (n 19), 792; Traversa and Flamini (n 53), 330; Moreno Gonzalez (n 33), 571

[157] José Antonio García Bañuelos, 'EU and Tax Rulings: Five Shades of Four State Aid Decisions' [2017] Journal of International Taxation 39, 55

[158] Richard (n 47), 43; Gunn and Luts (n 47), 124-125; Haslehner (n 140), 148

[159] Moreno Gonzalez (n 33), 564

[160] Jaeger 'Tax Incentives' (n 67), 41-42, 44; Luja, 'State Aid Benchmarking' (n 43), 114; Nicolaides, 'State Aid Rules' (n 43), 424

f. The EU ALP, Fiscal Sovereignty, and Tax Policy

At this point, in order to be able to properly discuss the impact of the EU ALP on fiscal sovereignty, it is necessary to very briefly outline the allocation of competences within the EU. This allocation is based on the principle of conferral, codified in Article 5 TEU. This principle limits the EU's power, allowing it to act only within the limit of the competences the Member States have conferred upon it in the Treaties.[161] The logical extension of the allocation of competences based on the principle of conferral is that competences which are not allocated remain with the Member States.[162] Competence over direct taxation remains with the Member States, which in effect means that they have the competence to design their own direct tax system as they please but must consistently exercise such competence in line with Union law,[163] including any Directives.[164] Despite some (limited) positive and negative harmonisation, "the tax sovereignty of the Member States lives on".[165] In essence, it is clear that despite direct taxation's obvious importance in the completion of the internal market, there are explicit limits to what can be achieved without clear political consensus and positive harmonisation. The Union can protect the integrity of the Treaties and ensure the Member States' compliance with their obligations, but without harmonisation neither the Court nor the Commission can take on the burden of filling in the blanks of the internal market without overstepping their powers.

A significant element of fiscal sovereignty is a right not to act – this means that where a Member State has, by omission, elected to not enact a specific anti-avoidance measure, it is not for EU law to step in to cover the gap.[166] Member States are free to not coordinate their tax systems.[167] This arguably means that the top-down imposition of an EU-wide ALP, which supersedes national TP regimes, would in fact interfere with Member States' fiscal sovereignty,[168] as State aid rules do not

[161] Articles 4(1) and 5(1) TEU
[162] Article 5(2) TEU
[163] Case C-279/93 *Finanzamt Köln-Altstadt v Roland Schumacker* ECLI:EU:C:1995:31, para 21; Case C-157/10 *Banco Bilbao Vizcaya Argentaria SA v Administración General del Estado* ECLI:EU:C:2011:813, para 28; Case C-287/10 *Tankreederei I SA v Directeur de l'administration des contributions directes* ECLI:EU:C:2010:827, para 14. See also: Case C-284/09 *Commission v Germany* ECLI:EU:C:2011:670, paras 56-58; Case C-379/05 *Amurta SGPS v Inspecteur van de Belastingdienst/Amsterdam* ECLI:EU:C:2007:655, paras 37-39
[164] Case C-48/07 *Service public fédéral Finances v Les Vergers du Vieux Tauves SA* ECLI:EU:C:2008:758, paras 25-27
[165] Wolfgang Schön 'Transfer Pricing, the Arm's Length Standard and European Union Law' in I Richelle, W Schön, E Traversa (eds) *Allocating Taxing Powers within the European Union* (Springer 2013), 83
[166] Luja, 'Do State Aid Rules Still Allow European Union Member States to Claim Fiscal Sovereignty' (n 30), 323
[167] Cees Peters, 'Tax Policy Convergence and EU Fiscal State Aid Control: In search of Rationality' (2019) 28 EC Tax Review 6, 6
[168] Monsenego (n 44), 43, 55; Liza Lovdahl Gormsen, *European State Aid and Tax Rulings* (Edward Elgar Publishing 2019), 43-45

impose or even imply an obligation to levy taxes.[169] The ECJ has explicitly held that there is no general obligation under EU law for anti-avoidance rules to exist.[170] Even if it is accepted that a "regime" of international taxation, as Avi-Yonah calls it,[171] exists, and that the principles underpinning this regime, such as the single-tax principle, the non-discrimination principle, and the benefit principle, inform the tax systems of Member States,[172] this does not mean by any means that there is harmonisation of direct tax matters, or that the allocation of competences provided by the Treaties in relation to direct taxation is at all affected. The Commission may indeed examine the aid character of tax rulings, but it cannot impose its own views or ideas as to what a tax system ought to look like.[173] This relates to the Commission's assertion that an arm's length principle indeed exists embedded in Article 107(1), which in effect prescribes a specific, if undefined, methodology for allocating the profits of MNEs. If this EU ALP is to be yielded in an inflexible manner, in effect it could be taken to mean that other methods of profit allocation are not allowed. In effect therefore, a wide understanding of the EU ALP and its elevation to primary law status would not simply ensure that existing tax rules are enforced in an equal manner but would also inform their material content. The EU ALP can thus be seen as a harmonised perception of profit allocation rules.[174]

State aid has always had a political element in its compatibility analysis, which represents State aid policy, as opposed to the State aid control inherent in the Article 107(1) prohibition.[175] This can also be evidenced by the extraordinary measures taken and frameworks adopted in relation to compatibility in the context of the 2008 financial crisis,[176] or the 2020 coronavirus pandemic.[177] The very nature

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[169] Raymond H.C. Luja, 'The Selectivity Test: The Concept of Sectoral Aid' in C Micheau and A Rust (eds) *State Aid and Tax Law* (Wolters Kluwer 2013), 112

[170] Case C-417/10 *Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v 3M Italia SpA* ECLI:EU:C:2012:184, para 32. This refers to general obligations, as opposed to the harmonisation achieved through the ATADs (Council Directive 2016/1164/EU of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market [2016] OJ L 193/1; Council Directive (EU) 2017/952 of 29 May 2017 amending Directive 2016/1164/EU as regards hybrid mismatches with third countries [2017] OJ L 144/1).

[171] See in general: Reuven S. Avi-Yonah, *International Tax as International Law: An Analysis of the International Tax Regime* (Cambridge University Press 2007)

[172] Pierpaolo Rossi-Macciano, 'Fiscal State Aids, Tax Base Erosion and Profit Shifting' (2015) 24 EC Tax Review 63, 66

[173] Richard Lyal, 'Transfer Pricing Rules and State Aid' (2015) 38 Fordham International Law Journal 38 1017, 1042

[174] Jaeger, 'Tax Concessions' (n 43), 232

[175] Peters (n 167), 8

[176] See for example: Conor Quigley 'Review of the Temporary State Aid Rules Adopted in the Context of the Financial and Economic Crisis' (2012) 3 Journal of European Competition Law and Practice 237; Damien Gerard 'Overview-Managing the Financial Crisis in Europe: The Role of EU State Aid Law Enforcement' in J Derenne, M Merola, J Rivas (eds) *Competition Law in times of Economic Crisis: in Need of Adjustment?* (Global Competition Law Centre, College of Europe (Research Center) 2013), 232-234.

[177] See for example: Commission, 'Temporary Framework for State Aid measures to support the economy in the current COVID-19 outbreak' (Communication) [2020] C/2020/1863, OJ C 91I/1

of the compatibility requirements in and of itself showcases at least a degree of policymaking and by extension political considerations. State aid policy as such goes beyond the control of illegal State aid measures.[178] Fiscal aid is a particularly sensitive, from a political perspective, issue, requiring balancing the imperative to combat aggressive tax planning and harmful tax competition, while also respecting the Member States' fiscal sovereignty.[179] There is no doubt that State aid control can in itself be a powerful tax policy tool,[180] and even a political pressure mechanism.[181] It is also arguable that the Commission's policy priorities have, to a significant degree, influenced the development of the concept of aid, and of its constituent parts.[182] State aid control can therefore be employed to achieve, or at least push towards, policy goals, such as fighting harmful tax competition.[183] In this context, it is arguable that the Commission's approach, especially in relation to the first few of the recent Decisions, has a certain test character to it.[184] Certainly, given the innovative nature of the Commission's approach, and the liberal interpretation of the case law that led to it, to an extent this observation rings true. Based on this, it is possible to argue that the desired effect, from the Commission's point of view, of this "testing of the waters" is to expand the role of State aid control to achieve a level of tax policy convergence.[185]

As the case law discussed in the previous Chapters shows, while the Union Courts have mostly accepted the Commission's approach to fiscal State aid, it is abundantly clear that the law still matters a lot.[186] Nonetheless, this functional approach has in effect led to a widening of the notion of fiscal aid, which is arguably necessary for the Commission's effective monopoly on the assessment of State aid to be maintained, and primarily for its control over "potentially distortive public intervention" to be preserved.[187] However, a delicate balance needs to be

[178] Juan Jorge Piernas López, *The Concept of State Aid Under EU Law: From internal market to competition and beyond* (OUP 2015), 53
[179] Luja, 'Just a Notion of Aid' (n 43), 789
[180] Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* Opinion of AG Jääskinen ECLI:EU:C:2011:215, paras 122-130. See also, in general: Rossi-Macciano (n 172); Emily Forrester, 'Is the State Aid Regime a Suitable Instrument to Be Used in the Fight Against Harmful Tax Competition' (2018) 27 EC Tax Review 19
[181] Romero J S Tavares, Bret N Bogenschneider, and Marta Pankiv, 'The Intersection of EU State Aid and U.S. tax Deferral: A Spectacle of Fireworks, Smoke, and Mirrors' (2016) 19 Florida Tax Review 121, 144
[182] Piernas López (n 178), 241. See also: Philipp Werner, 'Article 108 TFEU' in F J Säcker and F Montag (eds) *European State Aid Law* (Beck Hart Nomos 2016), para 42
[183] Peters (n 167), 14-15
[184] Jaeger, 'Tax Concessions' (n 43), 228-229
[185] Peters (n 167), p. 15-16
[186] See also: Piernas López (n 178), 240-254
[187] Francisco De Cecco, *State Aid and the European Economic Constitution* (Hart Publishing 2013), 96

maintained, especially in relation to taxation, and tax competition.[188] After all, State aid control was not designed to curb tax competition between States.[189] It is therefore clear that State aid policy is to an extent inseparably linked to State aid law, and that the evolution of the concept of aid in itself can be used to achieve or facilitate policy goals, and has arguably been influenced by such goals. Equally however, it is clear that this functional reading of the notion of aid, and of the case law, is not in itself absolute – it is in other words clear that the Commission can overreach, but also that the development of State aid depends more on the actual law, than on any policy considerations.[190]

In this instance, it is submitted that the necessary consequences of the Commission's reasoning go well beyond the limits of its powers. As it is conceived of by the Commission, and to the extent that this conception has been endorsed by the EGC, the ALP is perhaps too blunt an instrument, and definitely too ill-defined, to walk the fine line between tax policy and fiscal sovereignty, as it is unclear what exactly constitutes illegal aid in its context. This is especially true given the lack of objective criteria precisely defining the scope of aid, and by extension the delineating the competences of Member States.[191] It is possible for example that the incorrect application of the Commission's ALP can confer State aid,[192] or that a fiscally correct application is problematic from a competition law perspective.[193] The same approach could arguably be extended to mean that the mistaken but ultimately beneficial application of any fiscal rule can confer a selective advantage.[194] This point seems to be confirmed by the Gibraltar tax rulings Decision,[195] which in effect showcases that ineffective tax enforcement can in itself confer State aid.[196] The EU ALP's disregard for national TP regimes discussed above,[197] combined with its assumption into national law as part of the reference

[188] Michael Blauberger, 'Of 'Good' and 'Bad' Subsidies: European State Aid Control through Soft and Hard Law,' (2009) 32 West European Politics 719, 726; Thomas J Doleys, 'Managing the Dilemma of Discretion: The European Commission and the Development of EU State Aid Policy' (2013) 13 Journal of Industry, Competition and Trade 23, 24; Peters (n 167), 14-16

[189] Forrester (n 180), 30-31

[190] Consider for example the EGC's *obiter dicta* in relation to the "incomplete and occasionally inconsistent nature of the contested rulings" or the "regrettable methodological defect" in the Irish tax authorities' assessment. In effect the Court accepts that there may be problems with the contested rulings, but it still had to annul the contested Decision. Equally, consider the Court's rejection of the Commission's formalism in Dirk Andres. See to that effect: *Apple* (n 8), paras 348, 479, 500; *Dirk Andres* (n 97), paras 91-92. See also: Peters (n 167), 15

[191] Peters (n 167), 13-14

[192] Moreno Gonzalez (n 33), 571

[193] Wattel, 'Stateless Income' (n 19), 792. Compare with the Court's approach in *Starbucks* (n 8), para 213

[194] Traversa and Flamini (n 53), 330

[195] Commission Decision (EU) 2019/700 of 19 December 2018 on the State Aid SA.34914 (2013/C) implemented by the United Kingdom as regards the Gibraltar Corporate Income Tax Regime [2019] OJ L 119/151, recitals 151-196

[196] Luja, 'General Report' (n 127), 60

[197] *Starbucks* (n 8), para 161; *Fiat* (n 8), para 149; *Apple* (n 8), para 217

framework and as the comparative benchmark upon which an advantage is to be determined and thus its supersession of national rules, arguably mean that it infringes on fiscal sovereignty.[198]

Based on the Commission's and the General Court's approach of an EU ALP existing as a principle of equal treatment, and this prohibition of unequal treatment requiring a systemically more robust and equal allocation of MNEs' profits, the ALP is not the only means to achieve this end – let alone a hypothetical, undefined ALP contained in a terse paragraph of a soft law instrument with no accompanying guidance, save for references to other non-binding instruments. Even if we accept that the Treaties provide, albeit stealthily, for such harmonisation as an extension of the principle of equality of treatment, they do not provide for a set methodology, and the Commission cannot by any means assume the responsibility to fill this gap, as it would in effect be defining bases of assessment – and thus overstepping the bounds of its position.[199] There are more than one ways to achieve the goal prescribed to the ALP, and the silence of the Treaties cannot be inferred to translate into an acceptance of the ALP as the (only) methodology. In other words, the strict imposition of an EU ALP would take away the power of Member States to determine and define alternative profit allocation mechanisms. For example, equality of treatment as prescribed by the logic of Article 107(1), which is the basis of the EU ALP, could for example be achieved, at least to the same extent as by the ALP,[200] by a method and principle which differs widely from and is incompatible with the ALP, such as formulary apportionment. In fact, the Commission itself suggested the adoption of formulary apportionment in the 2011 and 2016 iterations of the CCCTB proposal.[201] If we are to adopt the Commission's reasoning on the ALP wholesale, this would surely mean that the CCCTB proposal would be contrary to a primary provision of EU law.[202]

Even if a unified, Treaty-derived ALP exists, it would be for the *national* legislator to define and up to the judiciary to apply the arm's length standards applicable in a Member State.[203] The imposition of an EU ALP with a set, if currently undefined, content would not allow Member States to define specific ALP-style mechanisms geared to their fiscal peculiarities, in the context of tax competition.

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[198] Monsenego (n 44), 43, 55; Lovdahl Gormsen (n 168), 43-45

[199] *Gibraltar* (n 94), para 97; *Starbucks* (n 8), para 159; *Fiat* (n 8), paras 106-107; *Apple* (n 8), paras 222-223. See also: Lyal (n 173), 1042

[200] Todhe (n 7), 262

[201] Commission Proposal for a Council Directive on a Common Consolidated Corporate Tax Base, COM(2016) 683 final, 2016/0336 (CNS), {SWD(2016) 341}{SWD(2016) 342}, preambles 8, 10, 11, and Chapter VIII; Commission Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121/4 2011/0058 (CNS), {SEC(2011) 315} {SEC(2011) 316}, Chapter XIV

[202] Wattel, 'Stateless Income' (n 19), 794, 801

[203] Luja, 'Will the EU's State Aid Regime Survive BEPS?' (n 154), 385

The Court itself has recognised the approximate and inherently somewhat inaccurate nature of the ALP,[204] and the lack of binding effects stemming from the Guidelines.[205] This reinforces the conclusion that, as the Guidelines and international practice have made abundantly clear,[206] the ALP cannot be an exact science, and even if the methodological approaches were to be deemed as black letter law, the existence of wide ranges make any sort of uniform, Union-level application a pipedream, at best,[207] thus making the input of national fiscal systems essential. Additionally, the supranational nature of the EU's ALP, and its supersession over national TP regimes, mean that a potentially more accurate and well-calibrated national regime may have to be set aside for the Article 107(1) ALP to apply.[208] Under this prism, the EU ALP could end up being self-defeating.

It is also worth noting that the Commission's conception of the ALP, which as discussed above is separate from the OECD standard, even if analytically very similar,[209] has the potential to create political and practical frictions in relation to the OECD approach in the future.[210] This is especially true if we consider for example the OECD's approach to profit allocation rules designed *specifically* to deal with challenges posed by the digitalisation of the economy, which are inherently different from the Commission's ALP by differentiating explicitly and by design between MNEs and standalone undertakings.[211] This could be problematic for Member States that wish to develop their tax system in line with the OECD, or which have a "dynamic" TP regime.[212] Therefore, a strict reading of the EU ALP, such as the one endorsed by the Commission, would in practical terms curtail the powers of Member State to determine and define their own tax system. Such an approach would also elevate the Commission into a direct taxation policymaker and enforcer, and would transform fiscal State aid control into an alternative vehicle for tax harmonisation.[213]

The choice of fiscal State aid as a policy tool to make any significant progress in the fight against aggressive tax planning and harmful tax competition is also

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[204] *Starbucks* (n 8), paras 199, 498; *Fiat* (n 8), paras 144, 204, 207; *Apple* (n 8), para 216
[205] *Ibidem*, paras 154-156; paras 146-148; paras 234-240, respectively
[206] OECD TP Guidelines (n 99), paras 1.13, 3.55; García Bañuelos (n 157), 55; Richard (n 47), 43; Haslehner (n 140), 148
[207] Luja, 'Will the EU's State Aid Regime Survive BEPS?' (n 154), 385-386
[208] Jaeger, 'Tax Concessions' (n 43), 227
[209] *Starbucks* (n 8), paras 161-166; *Fiat* (n 8), paras 149-155; *Apple* (n 8), paras 235-240
[210] Lovdahl Gormsen (n 168), 138
[211] OECD, 'Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy' (OECD 2019), Pillar II sections 1.2, 1.3, 1.5, 1.7, 3.1
[212] A dynamic TP regime is one which takes into consideration, without needing the enactment of new laws, all new findings and approaches endorsed in subsequent OECD Guidelines, or which expressly stipulates that amendments of the OECD are implicitly automatically implemented in national law. Austria is an example of the former, and Romania of the latter. See: Luja, 'General Report' (n 127), 80-81
[213] Peters (n 167), 17

questionable. Very much in the same way that the fundamental freedoms jurisprudence is limited to fixing one-country problems,[214] State aid cannot be used to deal with one of the main enabling factors of aggressive tax planning, inter-state disparities.[215] In part, this inherent limitation stems from the State resources and imputability criterion.[216] Based on the case law on the fundamental freedoms, it is worth considering whether double non-taxation is imputable to any one State. Double non-taxation represents an internal market obstacle (in that it distorts competition) which arises from the exercise in parallel of taxing powers by more than one States. The Court's jurisprudence in relation to double taxation suggests that it, and the Commission, lack the competence to decide who should tax and who should refrain from taxing. Arguably, this can be taken to apply in relation to double non-taxation in identifying which State actually should have taxed.[217] In other words, the advantage would stem from (at least) two States, as would be the case with all tax-related issues stemming from cross-border situations.[218] As such, and as illustrated by the McDonald's Decision,[219] the usefulness of State aid in combatting harmful tax planning is very much limited.[220]

It is arguable that the Commission is hesitant to accept the limits of State aid law in this context, as the nature of its ALP as a pan-European supersession of national regimes arguably seems to not recognise that distortions of competition can, and often do, arise from the lack of harmonisation of aspects of taxation.[221] For example, the Commission's approach in regards to *Apple* seems to suggest that in its eyes stateless income cannot exist.[222] This is simply not in line with the (unfortunate) economic reality. This policy outlook would be highly problematic, as

[214] The case law makes clear that in the context of the fundamental freedoms and taxation only one country problems can be solved, as otherwise the Court would be interfering with Member States' parallel (but lawful) exercise of their taxing powers. Such disparities, stemming from the interaction of different legal systems are not *per se* problematic. See to that effect: Case C-446/03 *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)* ECLI:EU:C:2005:763, para 45; Case C-240/10 *Cathy Schulz-Delzers and Pascal Schulz v Finanzamt Stuttgart III* ECLI:EU:C:2011:591, para 42; Case C- 96/08 *CIBA Speciality Chemicals Central and Eastern Europe Szolgáltató, Tanácsadó és Keresdedelmi kft v Adó- és Pénzügyi Ellenőrzési Hivatal (APEH) Hatósági Főosztály* ECLI:EU:C:2010:185, para 29. See also: Peter J Wattel, 'Forum: Interaction of State Aid, Free Movement, Policy Competition and Abuse Control in Direct Tax Matters' [2013] World Tax Journal 128, 142; Peter J Wattel 'General EU Law Concepts and Tax Law' in Peter J Wattel, Otto Marres, Hein Vermeulen (eds) *European Tax Law*, Volume I (7th edn, Kluwer Law International 2018), Part 3.2.1.1

[215] Rossi-Macciano (n 172), 67; Lyal (n 173), 1043

[216] Wattel, 'Stateless Income' (n 19), 798

[217] Rita Szudoczky, 'Double Taxation Relief, Transfer Pricing Adjustments and State Aid Law: Comments' in I Richelle, W Schön, E Traversa (eds) *State Aid Law and Business Taxation* (Springer 2016), 177-178

[218] Lyal (n 168), 1043

[219] Commission Decision (EU) 2019/1252 of 19 September 2018 on tax rulings SA.38945 (2015/C) (ex 2015/NN) (ex 2014/CP) granted by Luxembourg in favour of McDonald's Europe [2019] OJ L 195/20, recitals 109-126

[220] Moreno Gonzalez (n 33), 573

[221] Jaeger, 'Tax Concessions' (n 43), 232

[222] Wattel, 'Stateless Income' (n 19), 800

the Commission can, and should, wield State aid control to eliminate distortions of competition between undertakings, but distortions of competition between Member States (and possibly third States) are not within State aid's purview.[223] Normally, measures that affect the tax competitive position of the introducing Member State in relation to other States, cannot be seen as falling within the scope of State aid.[224] As such, combatting harmful tax competition is not within the scope of State aid, and extending the scope of aid to deal with such policy issues would distort the applicable legal framework.[225]

A final point that ought to be raised in this context concerns the differences between the ALP as conceived under State aid law, and as it exists in internal market law in relation to the fundamental freedoms. As discussed in the Tax Rulings, the Arm's Length Principle, and the Commission's Decisions Chapter, a national ALP can infringe free movement rules, as it makes cross-border economic activity subject to different rules when compared to purely domestic activity. However, the rationale of the base notion of the ALP can be justified based on the balanced allocation of taxing powers and the prevention of abuse. By extension, this means that under fundamental freedom rules an ALP assessment which deviates from market-based outcomes can be justified based on commercial considerations.[226] However, this is not allowed under the State aid conception of the principle. This in effect means that we are dealing with two expressions on the ALP in the case law of the Union's judicature that are conceptually very hard to reconcile.[227] Arguably, this means there could also be two separate and vastly different ALPs existing in EU law. Based on the analysis of case law relating to both iterations of the ALP, it is suggested that the approach employed in relation to fundamental freedoms is more flexible than the one used in State aid cases, with the latter being rather wide. This is partly due to the fact that in the case of fundamental freedoms law, the ALP used and giving rise to the analysis is the domestic one, in the context of its own content and objectives. In relation to State aid, the ALP examined and the one under which the analysis is to be carried out is the EU one, with no defined material content. In relation to internal market law therefore, there are no issues of fiscal

[223] Forrester (n 180), 30-31; Peters (n 167), 12; Lyal (n 173), 1043
[224] Claire Micheau, 'Tax Selectivity in European Law of State Aid: Legal Assessment and Alternative Approaches' (2015) 40 European Law Review 323, 327-328
[225] *Gibraltar* Opinion of AG Jääskinen (n 180), paras 130-135
[226] Case C-382/16 *Hornbach-Baumarkt AG v Finanzamt Landau* ECLI:EU:C:2018:366, paras 54-56; Case C-524/04 *Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue* Opinion of AG Geelhoed ECLI:EU:C:2006:436, para 67. See for the interaction of the ALP and the fundamental freedoms: Case C-311/08 *Société de Gestion Industrielle (SGI) v Belgian State* ECLI:EU:C:2010:26, paras 60-76; Case C-311/08 *Société de Gestion Industrielle (SGI) v Belgian State* Opinion of AG Kokott, ECLI:EU:C:2009:545, paras 72-73. See also Part IV(e) of the Tax Rulings, the Arm's Length Principle, and the Commission's Decisions Chapter.
[227] Buriak and Lazarov (n 150), p. 945; Lovdahl Gormsen (n 168), 49

sovereignty, as the Court deals with the *application* of the rules, ensuring in effect that the Member States exercise their taxing powers in accordance with EU law.[228]

However, if the EU ALP implicitly applies in a national context, and supersedes the domestic TP regime it is possible to end up in a situation where both sets of rules apply to one and the same ALP, as implied in Article 107(1). The unconditional application of the EU ALP can in effect result in breaching fundamental freedoms provisions,[229] while an approach which accepts commercially justifiable deviations from the ALP in line with internal market law risks breaching the State aid prohibition. It is obvious that this discrepancy, even in the context of two separate ALPs, can cause significant compliance issues for Member States, as they would have to simultaneously comply with two very different sets of rules in applying their own TP rules.[230] It can obviously cause even worse issues if the two diverging sets of rules are to be applied in the context of the same ALP. Therefore, there are two diverging "pulls", stemming either from two disparate conceptions and sets of rules relating to the same EU-wide principle, or from the awkward coexistence of two vastly different principles, one national and one supranational, within the same legal order. In either case, the diverging rules would have different aims,[231] causing further issues in their coherent application.[232] In practical terms, too restrictive an approach would risk violating fundamental freedoms rules, while too permissive an approach would risk conferring State aid.[233] As a result of the diverging "pulls" on the national tax system, the Member States are essentially only left with a limited median ground, or Goldilocks zone, in which they can safely operate, especially if a unitary, unsubstantiated, and inflexible ALP exists in the context of EU law.

In brief, it is clear that the EU ALP, as construed by the Commission, can pose issues in relation to fiscal sovereignty and the allocation of competences under EU law. This results to a large extent from the ALP's confusing nature, and its lack of sufficiently defined material content.[234] The combination of those two elements not only leads to legal uncertainty, but also makes both the practical and theoretical limits of the EU ALP very hard to pin down. Additionally, the overall lack of guidance,

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[228] See for example: Case C-190/12 *Emerging Markets Series of DFA Investment Trust Company v Dyrektor Izby Skarbowej w Bydgoszczy* ECLI:EU:C:2014:249, paras 58-59; *Commission v Germany* (n 163), paras 56-58

[229] Case C-324/00 *Lankhorst-Hohorst GmbH v Finanzamt Steinfurt* ECLI:EU:C:2002:749, paras 39-42; Case C-324/00 *Lankhorst-Hohorst GmbH v Finanzamt Steinfur* Opinion of AG Mischo ECLI:EU:C:2002:545, paras 79-81

[230] Buriak and Lazarov (n 150), 934; Lovdahl Gormsen (n 168), 50

[231] Wattel, 'Stateless Income' (n 19), 792

[232] As was showcased in the Compatibility with the Internal Market Chapter, it is indeed possible for State Aid rules and fundamental freedom rules to apply to the same case. See for example: Case C-169/08 *Presidente del Consiglio dei Ministri v Regione Sardegna* ECLI:EU:C:2009:709.

[233] Buriak and Lazarov (n 150), 907

[234] See for example: Lyal (n 173), 1042

and the ALP's linking to a principle of equality of treatment mean that its limits are equally ill-defined, exacerbating an overall lack of clarity on the limits of the notion of aid. At the same time, even in the context of the policy-influencing potential of State aid, the usefulness of it in combatting aggressive tax planning and harmful tax competition is questionable.

g. Conclusions on the EU ALP

In summary, one of the more striking, and interesting, elements of the tax ruling Decisions and the subsequent General Court judgments was the notion of the EU ALP. Defined in an extremely wide manner and given questionable doctrinal foundations by the Commission, the Court somewhat rolled back some of the more innovative elements of its basis. However, *grosso modo*, the Court accepted the notion of an EU ALP, and devised a reasoning inferring the ALP's existence in national tax systems. Despite three lengthy judgments being delivered and several long and technical Decisions being issued dealing, at least partially, with it, there is still no guidance as to its material content, as it is neither derived from the OECD model, nor is it a "chameleon" ALP, adopting elements of the fiscal regime it is imposed on, but rather it is, seemingly, autonomous. Equally, the EU ALP's nature is not clear either, straddling somewhere between a fiscal principle and a competition law one. The Court's mixed terminology[235] does not help in this context, even if it makes it easier to assume the ALP in national tax systems. This overall lack of clarity, coupled with occasionally questionable reasoning, is clearly problematic under the lens of fiscal and legal certainty (or in this case uncertainty). Those same elements can give rise to questions relating to the preservation of fiscal sovereignty. At the same time, the logic inherent in the EU ALP as understood in the context of State aid is in direct conflict with the ALP as understood in fundamental freedoms law.

In conclusion, it is clear that *Forum 187*, the case law basis for the assertion of an EU ALP, is not at all explicit, and arguably does not say what the Commission read into it, meaning that heavy reliance on it is problematic.[236] This is especially true given the lack of any other case law basis, and the clear departure from the Commission's own previous approach in cases concerning the ALP. Thus, the notion of an EU ALP is completely novel. In this context, the General Court's acceptance of this reasoning is a major coup for the Commission, even if, as shown, the reasoning implicitly inferring the EU ALP into national has some problematic elements. However, an equally major problem with this EU ALP construct, and a major question that remains unanswered, has to do with its content. It is possible to figure out what it is not – but that should give scant reassurance to taxpayers and tax

[235] *Starbucks* (n 8), paras 138, 151-152, 154, 157, 163; *Fiat* (n 8) paras 143-144, 146, 151, 155, 261; *Apple* (n 8), paras 194-195, 214-216, 225

[236] See for example: Juris and De Cock (n 17), 613-616; Todhe (n 7), 259-260; Kyriazis (n 38), 434-436; Nicolaides, 'State Aid Rules' (n 43), 419-420, 425-426

authorities alike. In the same vein, its nature remains murky, first due to the Court's ambivalent reasoning partly endorsing the Commission's approach and partly reigning it in, and secondly as a result of its explicit lack of content. Those two elements point to the effect the EU ALP could have on legal certainty.

The Commission's reasoning, combined with the lack of any real guidance and the dual nature of the EU ALP construct, potentially leads to a situation where the Commission may act as a fiscal supervisor, imposing a specific reading of a specific methodology. This outcome, which follows from both the Commission's and the Court's approach, is problematic in light of the allocation of competences, as there would be an interference not with the exercise of taxing powers, but their allocation.[237] Fiscal aid, whose limits are already unclear, can be potentially turned in a vehicle for tax harmonisation, despite its obvious limitations in combatting harmful tax competition and aggressive tax planning. The imposition of an EU ALP, which remains for most intents and purposes shrouded in mystery, into national tax systems restricts the powers of Member States to define their own tax systems and determine their own bases of assessment, thus calling into question fiscal sovereignty. Equally, the introduction of the EU ALP can reduce the Member States' ability to formulate tax policy. Overall, on the basis on all those issues, it is submitted that the EU ALP is problematic as a concept in EU law, based on its shaky foundations, its direct conflict with a well-established line of case law relating to fundamental freedoms, and the lack of clarity, substance, and legal certainty that surrounds almost every aspect of it. Those significant issues are compounded by the ALP's clear implications for fiscal sovereignty and tax policy. It is, in brief, in many ways a problematic tool, arguably employed to fix a problem it is unable to.

III. Burden and Standard of Proof

Given the distinct lack of clarity over the characteristics of the EU ALP, it was shown in the previous Part that its limits, practically and theoretically, are hard to define. In this context, a particularly interesting element of the General Court's judgments in *Starbucks*, *Fiat*, and *Apple* concerns the burden and standard of proof. Arguably, the practical analysis of the arm's length character of the contested rulings was the deciding factor, with the Court in effect demanding that the advantage be positively proven.[238] As discussed above, the existence of the advantage in the context of the Decisions, and the judgments they gave rise to, is based on the ALP. However, in this context the fact that the EU ALP lacks substantive material content becomes even more problematic, as the relevant "benchmark" from which a deviation is to be established is not fleshed out. There are no coherent

[237] See for example: *Emerging Markets* (n 228), paras 58-59. See also: Schön, 'Transfer Pricing' (n 165), 80, 88-89

[238] *Starbucks* (n 8), paras 211, 359, 403-404, 432, 491-498, 548-549; *Apple* (n 8), paras 242-245, 249, 284, 294, 302, 309, 319, 348, 373, 399-400, 405, 434-435, 475, 479-480, 487-488

general frameworks or objective criteria which can be used to ascertain the arm's length character of a given arrangement, meaning that even with a stringent and intensive level of review, the Commission has a great deal of autonomy in defining the characteristics of the benchmark forming the basis of the analysis.

Given the complex and approximate nature of any ALP, it is reasonable that a high burden of proof is placed on the Commission. Recognising those characteristics, the Court explained that an advantage can only exist if the variation between the two comparables goes beyond the inaccuracies inherent in the methodology used, leading to an outcome which cannot correspond to a reliable approximation of an arm's length outcome.[239] Those terms however are not defined or fleshed out. The Court also held that the mere identification of the methodological errors, or inaccuracies in the arrangements endorsed in the rulings is not sufficient to prove the existence of an advantage. Instead, the Commission must show that those arrangements resulted in a lowering of the recipients' chargeable base, and therefore their tax bill.[240] Equally, the Commission must prove that the methods relied upon by the national authorities are actually erroneous.[241] The incomplete or inconsistent nature of an endorsed TP arrangement is not sufficient proof that said arrangement confers an advantage.[242] In a similar vein, due to the approximations inherent in any ALP methodology, differences in the calculated outcomes between the Commission and the national tax authorities which are at different ends of a (wide) ALP range, or even which are close enough to the ALP range, cannot be deemed to confer an advantage.[243]

In effect, the Court's reasoning means that the Commission must carry out an economic analysis of significant depth, looking at a number of elements of the endorsed arrangements in order to prove that they have the *actual* effect of reducing the recipient's tax burden.[244] This points towards a very high standard of proof. Equally however, it means that the Commission cannot shift the burden of proof to the recipients and the Member States concerned by merely raising doubts about the contested arrangements. The Court therefore continues to demand an analysis of all relevant economic factors, which is in line with the burden and standard of proof discussed in the Advantage Chapter.[245] This in effect represents a

[239] *Ibidem*, paras 152, 196, 199; para 216, respectively; *Fiat* (n 8), paras 144, 149, 204
[240] *Ibidem*, paras 179, 201, 211, 427, 521; paras 319, 332-333, 347-350, 416-417; paras 271, 281, 286, respectively
[241] *Starbucks* (n 8), paras 432, 463-465, 474-475, 487, 491-497, 500-501; *Fiat* (n 8), paras 247-251, 280-286
[242] *Apple* (n 8), paras 348, 479, 500
[243] *Ibidem*, paras 476-477; *Starbucks* (n 8), paras 494-498
[244] *Ibidem*, paras 319, 325, 333; paras 201, 211, 427-428, respectively. Emphasis added.
[245] See for example: Case C-486/15 P *Commission v France and Orange* ECLI:EU:C:2016:912, para 87; Case T-865/16 *Fútbol Club Barcelona v Commission* ECLI:EU:T:2019:113, paras 58, 66-67. See also Part IV(c) of the Notion of Advantage Chapter.

more fiscal outlook, which takes into consideration the context and application of all applicable fiscal rules, ensuring that a fiscal advantage is actually proven by virtue of its effects, and not simply assumed as a result of its form. Thus, in all three cases, the Court conducted a thorough analysis of both the methodology employed by the national authorities, and that employed by the Commission. For example, it reviewed and scrutinised functional analyses, and risk analyses, to ascertain the correctness of profit level indicators,[246] of capital levels,[247] and of the pricing of royalties and other IP.[248] In effect, it is clear that the Court reviewed some of the key elements of a typical TP analysis as prescribed by the OECD.[249]

Arguably, the high standard of proof is a direct outcome of the EU ALP's lack of substantive content, which in effect necessitates a rigorous case-by-case analysis, in order for the benchmark and any deviation from it to be identified. Another root cause for the high burden and standard of proof is the internal conflict and contradiction between the ALP, or any determination of transfer prices for that matter, which is by definition subjective and imprecise, with the need, under the case law, to determine the existence of an advantage in an objective and unambiguous way.[250] This partially results from the fact that any ALP is hypothetical – it takes into account situations that may not in reality ever exist between independent enterprises, thus being a hypothetical and artificial benchmark and making a reliable approximation of market-based outcomes extremely complex. The character of the ALP as an imperfect and by definition approximate tool means in practical terms that it is extremely complicated, if not impossible, to produce a simple yes or no answer to the question of whether a tax ruling confers an advantage.[251] This lack of certainty is in conflict with the objective nature of the concept of advantage.

An additional factor contributing to the high standard of proof and the allocation of its burden are the parallels between the EU ALP and the MEOP. As discussed above, the early stages of the development of the EU ALP had strong ties to the MEOP, employing very similar language, and a similar rationale.[252] The utilisation of the EU ALP as a tool to determine the existence of an advantage in a manner similar to the MEOP can explain why it is up to the Commission to prove the incorrectness of the outcomes it is scrutinising, and why the standard of proof, in

[246] *Starbucks* (n 8), paras 439-501; *Apple* (n 8), paras 352-417
[247] *Fiat* (n 8), paras 230-264
[248] *Starbucks* (n 8), paras 217-373; *Apple* (n 8), paras 251-314
[249] See for example OECD (n 99), paras 1.38-1.63, 2.1-2.10
[250] Monsenego (n 44),136-144
[251] Richard (n 47), 43; Haslehner (n 140), 148; Gunn and Luts (n 47), 121, 124-125
[252] See for example: *Apple* Opening Decision (n 139), recitals 53-58; *Apple* Decision (n 7), recitals 146, 150, 360

effect must take into account all the relevant economic factors.[253] Given that finding a deviation from the EU ALP means that an advantage is present, it is reasonable that an approach similar to the one employed in relation to the MEOP is used in this context. Arguably, the high burden of proof also relates to the connection, in fiscal cases, between the notions of advantage and State resources – if a measure cannot be proven to have led to a reduction in tax liability, it would be hard to argue that any revenue was actually foregone, or that there was a transfer of State resources.[254] In effect, the vague nature of the EU ALP and the necessarily approximate character of any ALP make a high and stringent burden of proof an essential condition of its application.

The Court's approach arguably could shed some light on the actual practical limits of the EU ALP's application, which would be particularly valuable, given the seeming lack of theoretical limits discussed in the previous Part. In effect, based on the Court's analysis and the outcome of the three cases, in particular *Starbucks* and *Fiat*, it is possible to suggest that as long as the TP arrangement is justifiable on the basis of a reasonable functional analysis or other objective criteria that form part of the TP documentation and analysis, the contested ruling cannot be deemed to confer an advantage, as the position endorsed in it cannot be *proven* to be erroneous, even if it appears to be. Compare for example the payment of royalties from SMBV to Alki, which was included in the TP report and whose residual character and level were deemed to be at least not economically unreasonable,[255] with the segmentation of FFT's capital, which was not in line with the functional analysis, thus excluding relevant capital from remuneration calculations.[256] In effect, it is possible to extrapolate from the Court's economic analysis that the appropriateness or economic rationality of the TP arrangement is paramount.[257] Based on this, it is possible to argue that the notion of advantage in the context of the EU ALP can be limited to scrutinising the rationality of the allocation of taxable base, and therefore of taxing rights, inherent in transfer pricing. As long as the arrangements endorsed in a tax ruling follow reasonably from the TP

[253] See for example: Case C-300/16 P *Commission v Frucona Košice* ECLI:EU:C:2017:706, paras 75-76

[254] Case C- 279/08 P *Commission v The Netherlands (NOx)* ECLI:EU:C:2011:551, para 104; *Banco Exterior* (n 83), para 14; *Italy v Commission* (n 83), para 16; Case C-482/99 *France v Commission* ECLI:EU:C:2002:294, para 36

[255] *Starbucks* (n 8), paras 200-205, 253-265, 362-373

[256] *Fiat* (n 8), paras 232-279

[257] *Ibidem*, paras 240-241; *Starbucks* (n 8), paras 259-260; *Apple* (n 8), paras 226-229, 283, 293-294, 302, 309, 399. See also: Bruce Sewell, 'In Need of an Economic Reality Check – The Commission's State Aid Decision Regarding Ireland and *Apple*' (2016) 7 Journal of Competition Law and Practice 649, 650; Tavares, Bogenschneider, and Pankiv (n 181), 148, 183

documentation,[258] and especially the functional analysis,[259] it is submitted, that regardless of the effective tax rates endorsed, it would not be possible for that tax ruling to confer an advantage. Such a limit could explain why *Fiat* and *Starbucks*, which were nearly identical in their reasoning,[260] had such different conclusions – the latter was based on a reasonable analysis, while the former was not.

The conclusion to be drawn from this discussion is that the Commission has to do a significant amount of heavy lifting to prove the existence of an advantage following from the application of the EU ALP. The Court has shown that it does not shy away from complex economic assessments, and is not willing to allow the lack of content of the EU ALP to turn its application into a mere box-ticking exercise, or to allow for the Commission to pass on the burden of proving the appropriateness of the arrangement to the parties concerned.[261] This unsurprising turn of events puts a great deal of pressure on the Commission when placed in the context of what can be deemed an advantage under the ALP rationale, as it will have to conduct thorough and exhaustive analyses to prove the existence of an advantage to a requisite standard, by proving the erroneous nature of the TP arrangement, and by proving the correctness of its own assessment. It has to be proven that any inaccuracies in the TP arrangements go beyond those inherent in the methodology, and that those inaccuracies lead to an actual reduction of the recipient's tax burden. Based on this, it is submitted that an appropriately documented tax ruling whose end result reflects, or is close to, economic reality cannot confer an advantage, as the Commission will be unable to prove that the arrangement in question cannot lead to a reliable approximation of market-based outcomes. This holds true even if the effective tax rates that follow from that ruling are very low. This can arguably represent a practical limitation to the application of the EU ALP as part of the notion of advantage.

In brief therefore, the inherently approximate nature of the EU ALP comes into conflict with the notion of advantage for the purposes of State aid. The lack of objective criteria of assessment, a symptom of the overall lack of certainty and clarity that has been discussed in this Chapter, plays a role in this. As a result of the objective nature of the notion of advantage, the Court, following the case law, imposes a high burden and standard of proof on the Commission, recognising in

[258] See also for a similar argument based on the application of "defensible" national rules: Gunn and Luts (n 47), 121

[259] This is due to the functional analysis' paramount significance, amongst others, in determining the tested party, the profit level indicator, any risks, and in framing the comparability analysis. See for example: *Apple* (n 8), paras 328-351, 357-374, 391-406, 462, 471-474.

[260] Jaeger, 'Tax Concessions' (n 43), 224

[261] This mirrors the overall practice of the Court in relation to the economic analysis inherent in the notion of advantage. See for example: *Barcelona* (n 245); Case T-90/16 *Elche Club de Fútbol, SAD v Commission* ECLI:EU:T:2020:97; Case T-732/16 *Valencia Club de Fútbol, SAD v Commission* ECLI:EU:T:2020:98

this context the approximate nature of the ALP. This standard of proof, and the way in which the burden of proof is structured, mean that the Commission must conduct a thorough and in-depth analysis. The standard of proof demanded by the Court is particularly relevant, because it means that the Commission's attempt to base its analysis on its own standards, detached from national laws and international practice, has somewhat failed, in practice. However, it has only failed because the Commission's economic analysis was wrong, not because of any theoretical errors in the Commission's approach. There is realistically nothing stopping the Commission from utilising this approach in the future and correcting its economic analysis. In practical terms however, the economic rationality of a TP arrangement coupled with the burden and standard of proof, represent a potential limitation to the application of the EU ALP.

IV. The Problematic Conception of the Reference Framework

As discussed at length in the Selectivity Chapter, the determination of the reference framework is of paramount importance in the analysis of fiscal selectivity. It is under this reference framework that selectivity itself is to be evaluated. Errors in its determination vitiate the entire selectivity analysis.[262] The findings of, and inconsistencies in, the first step of the analysis significantly influence the outcome of the entire analysis.[263] In fact, in light of the well-documented widening of the first two steps of the selectivity analysis,[264] the reference framework is not necessarily distinguishable from the general system. Additionally, the objectives under which the comparability analysis will be undertaken increasingly seem to be those of the reference framework or general system.[265] The reference framework is also a particularly relevant part of the advantage analysis as it defines "normal" taxation,[266] and as such its correct determination is a cornerstone of any fiscal aid analysis. There are two main issues with the reference framework as conceived in the tax ruling

[262] *Dirk Andres* (n 97), para 107
[263] See for example: *Portugal v Commission* (n 83), para 56; Case C-270/15 P *Belgium v Commission* Opinion of AG Bobek ECLI:EU:C:2016:289, para 29
[264] See for example: Micheau (n 224); Massimo Merola, 'The Rebus of Selectivity in Fiscal Aid: A Nonconformist View on and Beyond Case Law' (2016) 39 World Competition 533; Phedon Nicolaides, 'Excessive Widening of the Concept of Selectivity' (2017) 16 European State Aid Law Quarterly 62
[265] *Gibraltar* (n 94), para 101; Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free Group (formerly Autogrill España), Banco Santander & Santusa Holding* ECLI:EU:C:2016:981, paras 57-60; Joined Cases C-78/08, C-79/80, and C-80/08 *Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v Paint Graphos Soc. coop. arl Adige Carni Soc. coop. arl, in liquidation v Agenzia delle Entrate and Ministero dell'Economia e delle Finanze and Ministero delle Finanze v Michele Franchetto* ECLI:EU:C:2011:550, paras 49, 63-64; *Portugal v Commission* (n 83), para 54; Case C-524/14 P *Commission v Hansestadt Lübeck* ECLI:EU:C:2016:971, para 54; Case T-399/11 RENV *Banco Santander and Santusa v Commission* ECLI:EU:T:2018:787 para 146
[266] *Apple* (n 8), paras 144-145

Decisions and the subsequent judgments, namely its width for the purposes of comparability, and the partially extra-systemic nature of it.

The Decisions discussed primarily follow the wide trend, arguing that the general tax system is the relevant reference framework, with an exceedingly wide objective of taxing corporate profits.[267] This can only be a meaningful determination if a holistic approach is to be employed,[268] meaning that the reference framework is not formulaically defined as the "general" system, but rather as the relevant set of rules, which include by definition the general system, but also any specific applicable rules, thus informing the limits of comparability to those subject to the rules. In effect, using the general corporate tax system disregards the national TP laws;[269] a problem which is exacerbated by the use of a supranational ALP as the "normal" taxation benchmark. This is particularly relevant, as by their very nature TP rules can only ever apply to integrated undertakings, meaning that the widening of the reference framework beyond the TP regime expands the domain of comparability to include all undertakings, regardless of whether they can engage in TP situations.[270] The Court, in all three judgments, spent very little time on the notion of selectivity and the determination of the reference framework, instead focusing on the notion of advantage and the accompanying economic analysis, mirroring the Commission's Decisions. In its brief analyses, it endorsed the Commission's outlook in relation to the reference framework.[271] In *Apple*, it stated that the tax rulings form part of the general Irish corporate tax regime, which it also found to constitute the reference framework, whose objective is the taxation of taxable profits.[272]

a. The Width of the Reference Framework and its Objectives

The first issue with the determination of the reference framework in the Decisions and the subsequent judgments is its width. As discussed in the Selectivity Chapter, it is clear that the width of the reference framework can vary wildly, and can indeed be the general tax regime.[273] That Chapter also advocates for a more consistent definition of the reference framework, partly due to the importance its

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[267] *Starbucks* Decision (n 7) recitals 232, 251; *Fiat* Decision (n 7), recitals 194, 209; *Apple* Decision (n 7), recitals 228-229; See to that effect: *Amazon* Decision (n 108), recitals 587-589; *Belgium* Decision (n 7), recitals 121-129; Commission Decision (EU) 2019/421 of 20 June 2018 on State Aid SA.44888 (2016/C) (ex 2016/NN) implemented by Luxembourg in favour of ENGIE [2019] OJ L 78/1, recitals 171-176; *Gibraltar* Decision (n 195), recitals 90-93, 176-177

[268] See for example: *Dirk Andres* (n 97), para 103; Case C-374/17 *Finanzamt B v A-Brauerei* ECLI:EU:C:2018:1024, para 37; Case C-203/16 P *Dirk Andres (faillite Heitkamp BauHolding) v Commission* Opinion of AG Wahl ECLI:EU:C:2017:1017, paras 105-109

[269] Lovdahl Gormsen (n 168), 60

[270] Jaeger, 'Tax Concessions' (n 43), 225

[271] See for example: *Fiat* (n 8), paras 360-361

[272] *Apple* (n 8), paras 155, 163

[273] See for example: *Forum 187* (n 20), para 95; *Concello de Ferrol* (n 83), para 36. Compare with: Case T-210/02 RENV *British Aggregates Association v Commission* ECLI:EU:T:2012:110, paras 49-51

objectives play in the comparability analysis. That analysis needs to be undertaken in the context of the objectives of one of the contested measure, the general system, or the reference framework.[274] In the tax ruling Decisions, the Commission defined the reference framework in the widest possible manner, as discussed above, and determined its objective, the taxation of corporate profits, as the relevant one for the comparability analysis.[275] This has the effect of making standalone undertakings and MNEs comparable. The choice of the wider reference framework arguably makes the Commission's work in proving selectivity easier, as the base of comparables in effect includes all undertakings liable to pay tax.[276] Thus, it arguably makes the comparability analysis meaningless, as it disregards the factual and legal situation of group undertakings.[277] A narrower reference framework made up from the relevant national rules would be more appropriate.[278]

To illustrate this practical issue, it needs to be stressed that treating standalones and MNEs as comparable is theoretically problematic. Such an approach disregards economic reality, as it denies the economic gains that arise from the nature of the firm.[279] Both from an economic and from a fiscal perspective, a distinction between the two sets of undertakings is rational.[280] As is clear from the discussion on the OECD ALP and the criticism of it in this thesis, groups engage in activities that standalones cannot, and are governed by a different economic rationality.[281] The very notion of TP rules, as understood in international practice, is based on the fact the integrated firms are different from standalone ones, that is the very *raison d'être* of the ALP. In other words, TP rules exist solely because of integrated firms, and reasonably could only ever apply to them. In this context, a reference framework which includes both categories, arguably undermines the OECD consensus.[282]

The nature of a standalone and an integrated firm also differs in relation to the obligations they face – the latter have to comply with TP rules, and are subject to tax, and therefore tax rules, in multiple jurisdictions.[283] MNEs are, in other words,

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[274] *World Duty Free* (n 265), paras 57-60; Case T-399/11 RENV *Banco Santander* (n 265), para 144
[275] See for example: *Apple* Decision (n 7), recitals 228-229; *Apple* (n 8), para 163
[276] Verhagen (n 39), 282
[277] Lang (n 133), 36
[278] Nicolaides, 'State Aid Rules' (n 43), 424-425; Lovdahl Gormsen (n 168), 56; Kyriazis (n 38), 434
[279] Haslehner (n 140), 156
[280] Jaeger, 'Tax Concessions' (n 43), 226
[281] See for example: Theresa Lohse, Nadine Riedel, and Christoph Spengel, 'The Increasing Importance of Transfer Pricing Regulations – a Worldwide Overview' (2012) Oxford University Centre for Business Taxation Working Paper 12/27, 6; Jinyan Li, 'Soft Law, Hard Realities and Pragmatic Suggestions: Critiquing the OECD Transfer Pricing Guidelines' in Wolfgang Schön and Kai A Konrad (eds) *Fundamentals of International Transfer Pricing in Law and Economics* (Springer 2012), 82-83; Luckhaupt, Overesch and Schreiber (n 99), 100; Schön, 'Transfer Pricing' (n 165), 96
[282] Forrester (n 180), 31
[283] Luja, 'Just a Notion of Aid' (n 43), 789; Jaeger, 'Tax Concessions' (n 43), 226; Wattel, 'Stateless Income' (n 19) 799

partly taxed on the basis of TP arrangements, being uniquely capable of entering such arrangements.[284] In effect, TP rules and the international tax regime are irrelevant to standalone firms. Thus, since the ALP is a methodology applicable to cross-border situations and in the context of integrated groups, the use of a purely domestic standalone entity as a basis for comparison seems irrational.[285] The ECJ has in its jurisprudence on fundamental freedoms, recognised that groups and standalones are not comparable, even while domestic and non-resident groups can be.[286] Given the fiscal and economic (or legal and factual) differences between standalones and integrated groups, it stands to reason that the same approach should be followed in the context of State aid – for the existence of selectivity and of an advantage to be ascertained, the comparison ought to be undertaken between integrated firms.[287] In other words, the reference framework should only include those undertakings which by their nature, and by the nature of their activities, are or can be subject to TP rules.[288] As Wattel notes this theoretical inconsistency can be demonstrated by the Belgian Excess Profit Scheme, where the competitive edge afforded to the benefitting MNEs was the fact that they were treated as standalone entities.[289]

In effect, this discussion suggests that the reference framework should have been defined as the national TP rules and tax ruling regimes. Those elements define the relevant legal regime in which integrated groups operate. As such, they can form a substantive and meaningful basis for comparison. By ignoring those elements of the national regime, the Commission commits an error in assessing the reference framework.[290] A comparison, by definition, requires a benchmark, which ought to be based on the context of the examined framework and the features of the undertakings subject to it.[291] Thus, the objective of the reference framework would have been the taxation of the corporate profits of integrated firms, based on a profit allocation analysis, designed to approximate market outcomes. Tax rulings would have been compared with other tax rulings in the context of the TP regime and practice.[292] In such a scenario, the Commission would have had to use national TP rules in its analysis, and examine the notions of selectivity and advantage in that

[284] Richard (n 47), 21-22
[285] Haslehner (n 140), 155
[286] *Thin Cap* (n 43), para 59; Case C-386/14 *Groupe Steria SCA v Ministère des Finances et des Comptes publics* ECLI:EU:C:2015:524, paras 22, 40
[287] Nicolaides, 'State Aid Rules' (n 43), 424-425; Richard (n 47), 41
[288] Jaeger, 'Tax Concessions' (n 43), 225-226. See also: Moreno Gonzalez (n 33), 564-565
[289] The Scheme in effect took advantage of the fact that MNEs are not actually comparable to standalone undertakings by treating the two groups as comparable for profit calculations and allocating the MNEs' excess profit outside Belgium's jurisdiction, effectively exempting it. See to that effect: Wattel, 'Stateless Income' (n 19), 796-797
[290] *Dirk Andres* (n 97), para 103; Case C-6/12 *P Oy* ECLI:EU:C:2013:525, para 20; Verhagen (n 39), 284
[291] Lang (n 133), 36
[292] Jaeger, 'Tax Concessions' (n 43), 229-230

context. However, by using the wider reference framework, the Commission in effect ends up disregarding the structure of the national tax system by deeming the scope of the domestic TP regime irrelevant. Thus, by disregarding national rules, it is able to rely on the EU ALP.[293] This is because in the context of MNEs, a profit allocation mechanism is essential for profits to be ascertained and allocated, and therefore taxed.[294] Thus, with the domestic regimes not applicable, the EU ALP is used in this capacity.

Additionally, the comparison, with its excessively wide scope, cannot be undertaken in the context of the relevant national rules. Instead, a principle wider than that had to be used. This follows from the Court's reasoning in the *Starbucks*, *Fiat*, and *Apple* judgments, where the EU ALP was implied into the domestic tax systems as a "benchmark" to ensure that integrated firms and standalones are taxed in the same way.[295] In effect, the EGC argues that the lack of formal differentiation in the domestic system between integrated and standalone undertakings means the profits of the former must be taxed as if they had arisen in normal market conditions. However, those conditions are defined based on the EU ALP, which in this context is by extension deemed to be the relevant tool for the assessment of an advantage under "the normal rules of taxation".[296] Thus, the EU ALP becomes the basis for the definition of normality and becomes the benchmark upon which selectivity (and advantage) are to be assessed. The equality orientation of the EU ALP allows it to exist at a higher level of generality within a tax system than the specific domestic TP rules and the tax ruling regime. In a sense, by defining such a wide reference framework which includes an external ALP, and which places all taxpayers in a comparable situation, the Commission seems to define what it considers to be the "normal" taxation of an integrated multinational undertaking, which it does not have the power to autonomously do.[297]

Based on the discussion above, it is clear that the definition of the reference framework as the general tax system is problematic. Such a wide definition disregards the structure of the domestic system and its specific provisions for TP situations, thus imposing to an extent the EU ALP as the relevant tool for the comparability analysis. Additionally, it leads to standalone and integrated undertakings being considered to be comparable, which is not in line with economic reality or the legal situation of integrated undertakings.

[293] Verhagen (n 39), 283
[294] This is discussed in more detail in the following Section.
[295] *Starbucks* (n 8), para 149; *Fiat* (n 8), paras 141, 145; *Apple* (n 8), paras 206-208, 212
[296] See for example: *Starbucks* (n 8), paras 146-147, 151-154, 160-163
[297] *Starbucks* (n 8), para 159; *Fiat* (n 8), paras 105, 112; *Apple* (n 8), para 223

b. An Extra-Systemic Reference Framework?

In this context, it is possible to discuss the extra-systemic nature of the reference framework. First, it is worth noting that the objective of taxing corporate profits which stems from the general reference framework is not necessarily the most relevant one, as the tax rulings do not remove or alter the liability to pay taxes on profits, but rather provide for the methods according to which those profits, and subsequently the taxes due, ought to be calculated. The objectives of the tax rulings therefore are not to tax, but to calculate the amount of tax payable. Tax rulings, and the relevant legal regime, provide for the methodology or "benchmark" used to determine the tax base. Therefore, the relevant question is not whether the recipient undertakings are liable to pay tax, but how much of their profit should be attributed to a given tax jurisdiction, and by extension how much tax they are liable to pay.[298]

For a standalone company, the tax base calculation is relatively simple, meaning that no specific methodology is necessary.[299] In effect, the basic, normal rules of taxation apply, with no need for TP. For MNEs, and domestic groups, however, as the inherent logic of the ALP reveals, this is not the case – as discussed, the ALP essentially allocates profits between the members of a group, and by extension between jurisdictions,[300] by approximating market prices,[301] through a complex methodology. This methodology, which is by its very nature case-specific, is what is contained in a tax ruling and what is provided for in the national TP and tax ruling regime. In other words, a tax ruling does not formally provide for a departure from statutory tax rates, or provide for specialised exemptions, but rather ascertains the tax base to which normal rules shall apply. The objective of a tax ruling therefore cannot be said, contrary to the Court's assertion, to be "to tax chargeable profits",[302] but rather it is to calculate those chargeable profits in accordance with national law. As such, even if a tax ruling and the relevant regime form part of the general corporate tax system, their objectives cannot be equated to those of said system.

Following the Court's logic in *Apple*, national TP rules, and the national tax ruling and TP regime and practice should be at least part of the reference system, as they lay down the regime in the context of which a tax ruling was adopted.[303] This is especially true given that the legal framework of which the contested measures form part, and the objectives of those measures, ought to be taken into account when determining the reference framework.[304] *In casu*, the relevant legal framework

[298] Jaeger, 'Tax Concessions' (n 43), 226
[299] See for example: *Apple* Decision (n 7), recital 230
[300] Schön, 'Transfer Pricing' (n 165), 80, 89
[301] Eden (n 99), 602
[302] *Apple* (n 8), para 155
[303] Nicolaides, 'State Aid Rules' (n 43), 424-425
[304] *Apple* (n 8), para 150

should be seen as the tax ruling and TP regime, and its objective as the allocation of profits for the purposes of corporate taxation. Those regimes contain the rules that inform the methodologies used to allocate profits, and therefore calculate the taxable base. The chosen national profit allocation methodology (in most cases the ALP) is absolutely necessary for the calculation of a MNE's taxable profits in a given jurisdiction, as it is it which enables the system to pursue its objective of taxing corporate profits.[305] Allocation rules are the legislative means that make the general tax system functionally applicable to integrated firms, and as such must be included in the reference framework.[306]

However, as discussed above, the Commission and the Court use the EU ALP as the "tool" or "benchmark" for the profit allocation, which in fact supersedes any national rules.[307] In effect therefore, the Court's rationale in relation to the EU ALP introduces it as the mechanism by which the objective of the widely construed reference framework is to be attained, thus making it part of the relevant applicable regulatory framework. Therefore, in the context of the EU ALP's nature as a principle of equal treatment,[308] the reference framework is the not made up solely of national rules, but also includes the supranational EU ALP as the allocation mechanism of choice. As such, the reference framework is apparently external to the system examined.[309] This would also follow from the notion of advantage, where the benchmark (normal taxation) against which an advantage is to be assessed tends to be the reference framework.[310] As in fiscal cases the determination of the reference framework forms part of the analysis of both selectivity and advantage,[311] and given that relevant benchmark for the purposes of advantage is the EU ALP, it follows that the EU ALP is also part of the reference framework. In fact, the very same logic is employed: a deviation from the EU ALP confers an advantage and demonstrates the measure's selectivity, by derogating from this benchmark.[312] Following this, it is submitted that based on the analysis of the Commission, the EU ALP is necessarily part of the reference framework, as it is against this benchmark that a derogation, in the form of a deviation from it, is to be established.[313]

Using an external reference framework is problematic, because the reference framework, by its very nature, can only be based on the tax laws of the Member

[305] Verhagen (n 39), 284
[306] *Apple* (n 8), paras 161-163
[307] See for example: *Starbucks* (n 8), paras 154, 172, 213
[308] It is this basis which allows for the use of an EU ALP external to the national system. See: *Starbucks* (n 8), paras 139, 154, 162
[309] Ricardo André Galendi Júnior, 'State Aid and Transfer Pricing: The Inherent Flaw Under a Supranational Reference System' (2018) 46 INTERTAX 994, 995; Lovdahl Gormsen (n 168), 56
[310] Case C-501/00 *Spain v Commission* ECLI:EU:C:2004:438, para 115
[311] *Apple* (n 8), paras 144-145
[312] Moreno Gonzalez (n 33), 565
[313] *Fiat* (n 8), para 361

State concerned – fiscal aid exists within the tax system and in relation to it. Fiscal aid and tax advantages can only be granted in the context of the tax system to which the recipient undertakings are "permanently and inevitably" subject.[314] This means that the determination of the reference framework is (normally) based solely on the laws of the Member State concerned.[315] In other words, a reference framework cannot be supranational, or derived from EU law;[316] such a reference framework would represent a major departure from the case law.[317]

This issue, combined with the width of the reference framework as employed by the Commission in the Decisions, make it apparent that the use of the national TP and tax ruling rules as the reference framework would have been far more appropriate.[318] Such an outcome would be more in line with the notion of a national reference framework, as it would have well-defined material content, by relying on and including the relevant elements of national law.[319] In effect however, under the position of the Commission and the Court, the reference framework contains the EU ALP, which as discussed above, lacks material content, and disregards elements of national law, imposing an external benchmark. As Jaeger notes, this is comparable to an extent to the *Gibraltar* judgment,[320] where in effect a comparison was undertaken under a "hypothetical" reference framework.[321] However, in *Gibraltar*, the ECJ merely went to a higher level of generality, looking at how the system itself was *ab initio* discriminatory, as a result of its (discriminatorily designed) bases of assessment.[322] It did not introduce a pan-European, supranational element into the system, and did not implicitly define the characteristics or the content of the tax system. An argument of systemic selectivity, on the basis of *Gibraltar*, could be made,[323] but, first, it was not made by the Commission or the Court, second, it would

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[314] Case C-233/16 *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Generalitat de Catalunya* Opinion of AG Kokott ECLI:EU:C:2017:852, paras 79-80; Joined Cases C-234/16 and C-235/16 *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Consejería de Economía y Hacienda del Principado de Asturias and Consejo de Gobierno del Principado de Asturias* Opinion of AG Kokott ECLI:EU:C:2017:853, paras 77-78; Joined Cases C-236/16 and C-237/16 *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Diputación General de Aragón* Opinion of AG Kokott ECLI:EU:C:2017:854, paras 79-80

[315] Verhagen (n 39), 284

[316] Wolfgang Schön, 'Tax Legislation and the Notion of Fiscal Aid: A Review of 5 Years of European Jurisprudence' in I Richelle, W Schön, E Traversa (eds) *State Aid Law and Business Taxation* (Springer 2016), 9; Monsenego (n 44), 43

[317] Gunn and Luts (n 47), 123

[318] Buriak and Lazarov (n 150), 925; Lovdahl Gormsen (n 168), 56; Kyriazis (n 38), 434; Nicolaides, 'State Aid Rules' (n 43), 424-425

[319] Monsenego (n 44), 43

[320] Jaeger, 'Tax Concessions' (n 43), 225

[321] *Gibraltar* Opinion of AG Jääskinen (n 180), para 202

[322] *Gibraltar* (n 94), paras 95, 101-104

[323] It could be argued that the system affords (only to) MNEs the opportunity to engage in base erosion and profit shifting, and is thus *ab initio* selective. This would be similar to the way in which the territoriality-based system of Gibraltar provided opportunities for various offshore contraptions

clash with the Commission's assertion that tax rulings are not *per se* problematic,[324] and third, it would call into question the very existence of TP rules and thus the economic reality of integrated groups.

An external reference framework has the effect of limiting the Member States' fiscal autonomy, as it imposes an extra-systemic element, based on which the domestic tax system is examined.[325] It imposes external elements and content into the domestic system. In this case, the use of the widest possible reference framework facilitates the introduction of the EU ALP, which imposes external elements into the system, setting aside national law. Thus, the external characteristics of the reference framework are introduced as a result of its width, and the concurrent existence of both problematic aspects is necessary for the EU ALP to be used as a benchmark. An external reference framework flies in the face of the notion that selectivity exists within the tax system. A (partially) extra-territorial reference framework in practice has a huge influence on the structure of the selectivity test, as it means that a derogation is not necessarily conceived as a departure from the relevant national law, but from an (unknown) international standard.[326]

In effect, the differentiation in treatment is not adjudged in the context of the relevant national law, but in that of the supranational standard. Arguably, in this context the differentiation analysis would become divorced from the structure of the national system, which would normally establish comparability, and the potential for justifications. This in effect makes it difficult for a Member State to be able to assess *ex ante* whether a measure it intends to introduce actually derogates from the standard, thus affecting legal certainty. More importantly however, it makes establishing *prima facie* selectivity much easier. This follows from the combination of the necessary width of the reference framework for an extra-systemic element to be introduced, and the fact that a derogation from that framework is established on the basis of an external benchmark, under the widest possible comparability analysis. This can be taken to mean that any deviation from the external reference framework would need to be justified, based on the intrinsic objectives and guiding principles of the system,[327] which arguably includes the EU ALP and its equality consideration. Obviously, this would make a justification harder

designed to mitigate tax exposures. See: Rossi-Macciano (n 172), 68; Wattel, 'The Cat and the Pigeons' (n 142), 189-190

[324] 2016 Notice (n 4), paras 169-170

[325] Roland Ismer and Sophia Piotrowski, 'The Selectivity of Tax Measures: A Tale of Two Consistencies' (2015) 43 INTERTAX 559, 561; Schön, 'Tax Legislation' (n 316), 9. See also: Forrester (n 180), 28

[326] This is especially true given that the derogation and the deviation from the EU ALP are the same thing. See: *Fiat* (n 8), para 361

[327] *Portugal v Commission* (n 83), paras 82-84; *Paint Graphos* (n 265), para 65; *P Oy* (n 290), para 22

than it already is. In practice, this reasoning would mean that a tax ruling is selective, unless it correctly applies the EU ALP.

In brief, based on the nature of international taxation and the objectives of TP as they relate to the taxation of MNEs, it is clear that the relevant benchmark for the ALP calculation is part of the reference framework. In the Decisions, and the Court's judgments, this benchmark is the EU ALP – a supranational construct, external to the domestic tax system. This is clearly problematic, both in terms of fiscal sovereignty and as it relates to the notion of fiscal selectivity and fiscal aid in general.

c. Conclusion on the Reference Framework

In conclusion, it is clear from the discussion above that the definition of the reference framework in the tax ruling Decisions and the subsequent judgments is problematic. It is defined formulaically and in the widest possible manner, as the general corporate tax regime. As a result, the economic and legal realities of MNEs are disregarded for the purposes of comparability, but most importantly the relevant national rules are also disregarded. Given the necessity of a profit allocation mechanism for the effective taxation of the corporate profits of integrated firms, the EU ALP becomes part of the reference framework, in the same way it becomes the benchmark to determine the existence of an advantage. This results in a reference framework which is partially external to the system it is applied in, which can create further limitations to the Member States' fiscal sovereignty.[328] Additionally, an extra-systemic reference framework can be problematic for the entire notion of selectivity, by disassociating it from the national context in which it is to be ascertained. A wide definition of the reference framework is necessary for the EU ALP to apply instead of the national rules, meaning that one issue follows on from the other.

To avoid those issues, it is submitted that the reference framework should have been defined as the national tax ruling regime and/or the national TP regime, where one exists. Alternatively, the reference framework should have been determined to be the general corporate tax regime as it applies to integrated groups – in other words *including*, in a substantive manner, the national tax ruling and TP regime. Neither of those would impose or need to rely on an external benchmark. In effect, the objective of either reference framework would be the determination of the taxable profits of integrated firms, and their subsequent taxation in line with national law, as the set of rules pertaining to TP situations are a necessary mechanism to ensure that the accurate taxation of such profits in possible.[329] Under either framework, the comparison would necessarily be limited to undertakings which are actually in a similar legal and factual situation, as their tax

[328] Lovdahl Gormsen (n 168), 43-45, 56; Forrester (n 180), 28
[329] Verhagen (n 39), 284

exposure is not obvious and needs to be ascertained based on the provisions of the relevant national regimes. In this context, selectivity would be assessed at the level of integrated firms, in line with the ALP portion of *Forum 187*.[330] Such an approach would also be in line with the perception that tax rulings are not *per se* problematic.[331] Additionally, such an approach would exclusively make use of the national rules both as the reference framework, and by extension as the benchmark used to establish a deviation from market conditions for the purposes of the advantage analysis. This by extension would mean that an EU ALP would not be necessary for the Commission to carry out its analysis. The domestic regime, and the general tax ruling practice could have provided for an equally good benchmark to analyse the notions of selectivity and advantage in the context of allegedly "sweetheart" deals.[332] This is especially true in the context of the practical limitations stemming from the standard of proof, discussed in Part III. At the same time, the use of national law for those examinations would not have raised any issues relating to fiscal sovereignty, as the State aid investigations would be into the application of the systems concerned, not their content. Overall, a reference framework composed of, or at the very least substantively containing, the national TP and tax ruling framework would have been more appropriate.[333]

To an extent, all the issues discussed in relation to the EU ALP stem from this very wide definition, and the resulting external character of the reference framework and the relevant benchmark. Therefore, arguably, the manner in which the reference framework is determined in the cases at hand is the bedrock of one of their more significant legal and political issues. Based on the analysis of the reference framework itself, and that of the imposition of a problematic EU ALP as a necessary consequence of the width of the reference framework, it is submitted that the Commission, and the General Court, committed an error in relation to the reference framework.

V. The Notion of "Selective Advantage"

It is clear that beyond the invention of the EU ALP, the rationale of the tax ruling Decisions is also problematic in the context of the notion of selectivity, especially in relation to the determination of the reference framework. In general, Parts III and IV have shown that the introduction and application of the EU ALP does not necessarily sit comfortably alongside either the notion of advantage or the concept of selectivity. In this context, it is necessary to briefly examine the notion of "selective advantage".

[330] *Forum 187* (n 20), paras 122-123
[331] Moreno Gonzalez (n 33), 564-565
[332] See for example: Jaeger, 'Tax Concessions' (n 43), 229-230
[333] Kyriazis (n 38), 434; Nicolaides, 'State Aid Rules' (n 43), 424-425

One of the common elements to be found in a number of the Decisions detailed above is the merging of the criteria of advantage and selectivity under one heading, and often under a single analysis.[334] Given the similarities, in fiscal cases, between the two notions as a result of the interdependence of the reference framework and the benchmark, and given that in all Decisions those are the only two criteria of the notion of aid that are discussed at any length, analysing them under one heading is not *per se* problematic. It is worth noting that the term "selective advantage" is and has been used for a period of time in relation to State aid, featuring in soft law documents,[335] academic commentaries,[336] Commission Decisions,[337] Opinions of Advocates General,[338] and ECJ judgments.[339] However, in the instances where the term was used, it is clear, especially in the case law, that it does not refer to a unified criterion or notion, but rather the term "selective" qualifies the term "advantage".[340] The usage and existence of the term cannot be taken to mean that a unitary concept of "selective advantage" exists. The term's usage is reasonable, as it is the combination of the two notions of selectivity and advantage (and the remaining three) that together showcase a (fiscal) measure's aid character. A non-selective advantage does not raise any issues, and neither does a selective measure which does not improve its recipients' position.

The General Court, in its *Starbucks*, *Fiat*, and *Apple* judgments recognised the distinction between the two criteria, and explained that the two may be considered concurrently, but should be analysed separately.[341] As a result, conducting a single "selective advantage" analysis is arguably problematic. On a

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[334] See for example: *Starbucks* Decision (n 7), recital 229 et seq.; *Fiat* Decision (n 7), recital 191 et seq.. See also: Part V(b) of the Tax Rulings, the Arm's Length Principle, and the Commission's Decisions Chapter.

[335] State Aid Action Plan - Less and better targeted State Aid: a roadmap for State Aid reform 2005–2009 (Consultation Document) {SEC(2005) 795} [2005] COM/2005/0107 final, para 7

[336] Quigley, *European State Aid Law* (n 2), 63; Andrea Biondi and Elisabetta Righini, 'An Evolutionary Theory of EU State Aid Control' (2014) King's College London Dickson Poon School of Law Legal Studies Research Paper Series, Paper No. 2014-41, 15

[337] See for example: Commission Decision 2005/261/EC of 30 March 2004 on the aid scheme which the United Kingdom is planning to implement as regards the Government of Gibraltar Corporation Tax Reform [2005] OJ L 85/1, recitals 102, 127, 148, 151; Commission Decision 2011/527/EU of 26 January 2011 on State Aid C 7/10 (ex CP 250/09 and NN 5/10) implemented by Germany – Scheme for the carryforward of tax losses in the case of restructuring of companies in difficulty (Sanierungsklausel) [2011] OJ L235/26, recital 51

[338] See for example: *Gibraltar* Opinion of AG Jääskinen (n 180), para 232; Case C-15/14 P *Commission v MOL Magyar Olaj- és Gázipari Nyrt* Opinion of AG Wahl ECLI:EU:C:2015:32, para 111

[339] See for example: *Gibraltar* (n 94), para 77 et seq.; Case C-15/14 P *Commission v MOL Magyar Olaj- és Gázipari Nyrt* ECLI:EU:C:2015:362, para 48; Case C-270/15 P *Belgium v Commission* ECLI:EU:C:2016:489, para 32

[340] See for example: Case C-706/17 *Achema AB and Others v Valstybinė kainų ir energetikos kontrolės komisija (VKEKK)* ECLI:EU:C:2019:407, paras 81-88; *A-Brauerei* (n 268), paras 19-21, 35; *Dirk Andres* (n 97), paras 82-86; Case C-128/16 P *Commission v Spain and Others* ECLI:EU:C:2018:591, paras 35-37, 89-97; *World Duty Free* (n 265), paras 53-54; *Belgium v Commission* (n 339), paras 31-33

[341] *Starbucks* (n 8), para 129; *Fiat* (n 8), para 122; *Apple* (n 8), para 138

very basic level, a joint analysis goes against the jurisprudence of the ECJ which states that the two notion must be "clearly distinguished",[342] which is not achieved when they are analysed together in a manner that blends them beyond recognition, or the possibility of separation. Such a combined methodology, which entangles the notion of advantage in the second step of the selectivity analysis by treating it as a derogation from the reference framework, and vice versa,[343] can create analytical problems.

The combination of selectivity and advantage impacts the notion of advantage in relation to the associated burden of proof, as a derogation from a reference system, formally understood, does not automatically or necessarily translate into favourable treatment.[344] In other words, a derogation does not automatically equal a differentiation in effective treatment. It is after all possible that the beneficiary of a seemingly favourable fiscal provision ends up paying a higher effective tax rate than other comparable non-recipient undertakings.[345] It is worth remembering, as discussed in the Advantage Chapter, and Part III of this Chapter, that an advantage needs to be positively proven, and a significant standard and burden of proof is attached to it.[346] Additionally, the Court's reasoning in relation to the recent Decisions, follows the case law, and requires that a (proven) deviation from the (EU) ALP goes beyond the inaccuracies inherent in the system.[347] This shows that the advantage is not merely a derogation from the reference framework, but a deviation which goes beyond any inherent methodological inaccuracies *and* which leads to a lowered chargeable base and therefore tax burden. This means that the identification of a derogation cannot in and of itself coincide with the identification of an advantage. By extension, and following the General Court's reasoning in *Fiat*,[348] it seems that under the combined approach, the identification of an advantage will be deemed to be the derogation from the reference framework,[349] understood in the context of the three-step selectivity analysis.

This approach allows for an actual advantage analysis, but in the process converts the advantage criterion into a part of the selectivity analysis. In a sense any

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[342] *MOL Magyar* (n 339), para 59. See also: *MOL Magyar* Opinion of AG Wahl (n 338), para 47
[343] See for example: *Fiat* (n 8), para 361; *Apple* Decision (n 7), recitals 224, 245; *Starbucks* Decision (n 7) recital 253; *Fiat* Decision (n 7), recital 217
[344] *Barcelona* (n 245), para 38
[345] Begona Perez Bernabeu, 'How to Determine the Existence of a Tax Advantage: The F.C. Barcelona Case' (2019) 18 European State Aid Law Quarterly 377, 380
[346] *Frucona Košice* (n 253), paras 59-61, 75-76; Case C-559/12 P *France v Commission* ECLI:EU:C:2014:217, para 63; Case C-290/07 P *Commission v Scott SA* ECLI:EU:C:2010:480, para 90; *Barcelona* (n 245), paras 58-59, 66; *Elche* (n 261), paras 114, 132-141; *Valencia* (n 261), paras 134-136, 194-206
[347] *Starbucks* (n 8), paras 152, 211; *Fiat* (n 8), paras 144, 280, 286; *Apple* (n 8), paras 216, 319
[348] *Fiat* (n 8), para 361
[349] See also: *Apple* Decision (n 7), recitals 224, 245; *Starbucks* Decision (n 7) recital 253; *Fiat* Decision (n 7), recital 217

advantage identified in this manner will be, at least *prima facie*, selective, as the first two steps will be automatically and simultaneously satisfied. In effect, the equation of such an advantage with a derogation makes the latter's existence incumbent on that of the former, and essentially removes the second step of the selectivity analysis, replacing it with the notion of advantage. In the context of a widely defined reference framework, where all undertakings end up being comparable, especially when combined with the *World Duty Free* judgment,[350] fiscal selectivity has become relatively easy to establish. If the second step is replaced by the notion of advantage and a derogation is defined as the existence of a beneficial outcome within the system, and the reference framework and its accompanying objective are so wide as to make the comparability analysis meaningless, fiscal State aid is effectively expanded to encompass the examination of (all) differential outcomes stemming from the general system. Under the logic of the tax ruling Decisions, any differential outcome can be deemed to be a *prima facie* selective advantage. In other words, the identification of the advantage itself under this approach can be taken to confirm its selective nature, subject to any potential justifications.

Plainly, such a combined test would not allow for the two criteria to be clearly distinguished, or even distinguishable, as per the requirements of the case law and the very notion of State aid itself.[351] Additionally, the combined test would in effect discount, *prima facie*, the possibility of a non-selective advantage, or of a measure which while being selective does not in fact confer an advantage. It would conflate a departure from the reference framework, which may or may not be beneficial, with an actual benefit. In brief, this approach cannot be said to be either analytically satisfactory, or in line with the case law of the ECJ. This merged approach arguably partly results from the EU ALP, as its foundational logic as a principle of equal treatment is more closely aligned with the notion of selectivity, while its main function is typically in line with the notion of advantage. Using an EU ALP rooted in the principle of equal treatment which doubles as the analytical tool used for the determination of the existence of an advantage inevitably merges the rationale of the two criteria.

Additionally, this approach does not need a rule to derogate from the system, but merely to create a difference in treatment. It is in effect a wide reading of the already wide concept of selectivity expressed in *World Duty Free*.[352] In essence, in the Decisions concerned with the ALP and its application, the misapplication of the ALP is taken to be the derogation, as it also is the advantage. Thus, the combined approach arguably can be taken to mean that any

[350] In that case it was held that a measure which derogates is selective if it benefits certain operators and not others in a comparable legal and factual situation. See: *World Duty Free* (n 265), paras 76-77. See also: *Apple* (n 8), paras 147-148.
[351] *MOL Magyar* (n 339), para 59. See also: *MOL Magyar* Opinion of AG Wahl (n 338), para 47
[352] *World Duty Free* (n 265), para 76

misapplication of TP rules will lead to a selective advantage being present;[353] even a non-advantageous tax ruling would, in most instances, still derogate from the (widely defined) reference framework by providing for a differentiating methodology for the tax base calculation. Given the highly imprecise nature of any ALP, be it derived from Article 107(1) TFEU, from the OECD, from national law, or a combination thereof, this complementary nature of a derogation and an advantage advocated in the Decisions,[354] and recognised by the Court,[355] is obviously problematic. Given for example the prevalence and width of ALP ranges,[356] and their practical uncertainty,[357] and given the overall "grey" nature of the ALP,[358] what would actually constitute a misapplication is unclear. This is exacerbated as a result of the EU ALP's lack of material content and the lack of any guidance on its application save for the case-by-case approach used by the Commission.[359] In a sense, under the OECD approach there is no one and only correct application,[360] and under an EU ALP there is no guidance as to what a reliable approximation of market-based outcomes is, meaning that there is no legal certainty whatsoever for either taxpayers or tax administrations.[361]

Additionally, this approach could, in theory, be taken to mean that the mistaken but ultimately beneficial application of any fiscal rule can confer a selective advantage.[362] This is exacerbated by the inherent complexity of many constituent elements of taxation, which makes their correct application more an art than a science.[363] Simply put, there is no actual limitation to what could be caught under this reasoning. Arguably, such an approach can bring general measures within the scope of the State aid prohibition, as all that is needed is in effect a different outcome stemming from the application of such a measure. By essentially taking away the need for an actual derogation, in a manner very different to *Gibraltar* or *British Aggregates*,[364] the combined approach creates a situation where any beneficial, when compared to the situation of all taxpayers, outcome can be taken to be both a derogation and the advantage, thusly making it a *prima facie* selective

[353] Moreno Gonzalez (n 33), 564
[354] See for example: *Apple* Decision (n 7), recitals 224, 245; *Starbucks* Decision (n 7) recital 253
[355] *Fiat* (n 8), para 361
[356] OECD TP Guidelines (n 99), paras 1.13, 3.55-3.62; Michael C Durst, 'OECD Guidelines: Causes and Consequences' in Wolfgang Schön and Kai A Konrad (eds) *Fundamentals of International Transfer Pricing in Law and Economics* (Springer 2012), 127
[357] García Bañuelos (n 157), 55
[358] Richard (n 47), 43
[359] Jaeger, 'Tax Concessions' (n 43), 229
[360] Haslehner (n 140), 148
[361] Luja, 'Just a Notion of Aid' (n 43), 790; Jaeger, 'Tax Concessions' (n 43), 227
[362] Traversa and Flamini (n 53), 330. See also: Moreno Gonzalez (n 33), 571
[363] Luja, 'General Report' (n 127), 60; Gunn and Luts (n 47), 121
[364] In those instances, the reference framework at its highest contextually possible level of generality was constructed in a manner which *ab initio* excluded from its scope of application an *ex ante* determinable privileged category of recipients. See to that effect *Gibraltar* (n 94), paras 101-102; *British Aggregates* (n 273), paras 49-51

advantage. This is especially true given that the concept of *de facto* selectivity has been eroded by *World Duty Free*, and that the identification *ex ante* of a privileged category is no longer necessary,[365] meaning that any differential outcome can *ex post facto* be evaluated and found to confer a selective advantage. As an illustration of this issue, it is worth considering effective tax rates (ETRs).

ETRs indicate the amount of tax actually paid by undertakings in relation to taxable income. A vast body of economic research suggests that several elements of an undertaking's structure, economic situation, business model, and behaviour can affect its ETR, either raising it, or more often lowering it. For example, an undertaking's size, overall debt, profitability, cash flow, composition of assets, legal form, and multinational presence all affect its ETR.[366] Interestingly, even certain types of fiscal reform, such as a cut in statutory rates, can greatly affect the ETR of equity-financed and debt-financed investment in different ways.[367] Beyond this, it has been suggested that employing audit firms, and the sectoral expertise of those firms, also has the effect of lowering a client firm's ETR, while the same applies to the range of accounting techniques available to an undertaking.[368] The existence and causes of lower ETRs clearly showcase that the application of general measures can lead to advantages (lower tax liabilities) for certain undertakings, based on a range of causes. If the reference framework is defined as the general system whose objective is the taxation of profits, all undertakings are comparable, and if an advantage, which economic research suggests would exist, can be deemed as a derogation from the framework, then, in effect, the identification of that advantage/derogation would be sufficient to prove the selective nature of the advantage.[369] Based on the rationale stemming from the notion of "selective advantage" and the case law discussed in the Selectivity Chapter, it becomes clear that any differentiations in the fiscal outcomes of the benefitting undertakings can be seen as a *prima facie* selective advantage, subject to the, as discussed, limited

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[365] Compare *World Duty Free* (n 265) paras 71-74 with *Gibraltar* (n 94), para 104. See also: Case C-66/14 *Finanzamt Linz v Bundesfinanzgericht, Außenstelle Linz* Opinion of AG Kokott ECLI:EU:C:2015:242, para 109.

[366] Delgado, Fernández-Rodríguez, Martínez-Arias, 'Corporation Effective Tax Rates' (n 137), 2096; Delgado, Fernández-Rodríguez, Martínez-Arias, 'Effective Tax Rates' (n 137), 489-493; Kraft (n 137), 16-17; Claire Crawford and Judith Freedman, 'Small Business Taxation' in Stuart Adam, Tim Besley, Richard Blundell, Stephen Bond, Robert Chote, Malcolm Gammie, Paul Johnson, Gareth Myles and James M Poterba (eds) *The Mirrlees Review Vol. I: Dimensions of Tax Design* (IFS 2010), 1046

[367] Alan Auerbach, Michel Devereux, Helen Simpson, 'Taxing Corporate Income' in Stuart Adam, Tim Besley, Richard Blundell, Stephen Bond, Robert Chote, Malcolm Gammie, Paul Johnson, Gareth Myles and James M Poterba (eds) *The Mirrlees Review Vol. I: Dimensions of Tax Design* (IFS 2010), 878

[368] Sean T McGuire, Thomas C Omer, Dechun Wang, 'Tax Avoidance: Does Tax-Specific Industry Expertise Make a Difference?' (2012) 87 The Accounting Review 975, 977, 998; Delgado, Fernández-Rodríguez, Martínez-Arias, 'Effective Tax Rates' (n 137), 489-490

[369] In effect, the advantage would derogate by allowing for a difference in treatment between comparable undertakings, even if there is no actual derogating measure. See: *World Duty Free* (n 265), paras 76-77

possibility for justification. Clearly, such an outcome, in light of the limited practical significance of the other three criteria in fiscal cases,[370] has the effect of further widening the scope of fiscal selectivity and therefore fiscal State aid.

In brief, the Commission's and the Court's rationale in the tax ruling cases clearly has a tendency to analyse selectivity and advantage in tandem, treating the latter as a derogation for the purposes of the three-step selectivity test. However, this approach mixes the two notions to a point where they become hard to distinguish. This is problematic, as selectivity and advantage are separate notions, and criteria of aid. As such they need to be analysed and proven separately, due to the cumulative nature of the criteria of aid,[371] and because their concurrent presence, alongside the other three criteria, is what actually confers a measure its State aid character. This is particularly relevant in fiscal cases, due to the limited significance of the other three criteria. Additionally, it has been shown that a combined analytical approach to selectivity and advantage contributes to the further widening of the notion of selectivity, and can actively alter its scope of application. As a result, it is submitted that such an approach, which does not allow for the two notions to be examined separately but merges the two analyses, is problematic in relation to the notion of aid and the cumulative nature of its conditions, while also being specifically problematic in the context of the concept of selectivity.

VI. Conclusion

This Chapter set out to discuss some of the more problematic and significant issues of the Commission's reasoning in the tax ruling Decisions, utilising the judgments of the General Court, where available. This discussion has focused on four issues, which despite being separate, are all somewhat interrelated. First, the notion of the EU ALP was discussed. Its analysis concluded that beyond the weak case law foundations and occasionally questionable reasoning, this notion also suffers from a lack of clarity. Its content is not at all defined or based on objective criteria, as the EU ALP is derived neither from national law, or international practice – the only guidance that exists is the Commission's (possibly erroneous, as demonstrated by *Starbucks* and *Apple*[372]) application of it on a case-by-case basis.[373] This issue in turn makes it difficult to determine the nature of the EU ALP, and the limits of its application. This clearly creates significant issues in relation to

[370] See: Part II (c); and Part III (d) of The Notions of State Resources, Effect on Trade, and Distortion of Competition Chapter
[371] Joined Cases C-278/92, C-279/92, and C-280/92 *Spain v Commission* ECLI:EU:C:1994:325, para 20; *France v Commission* (n 254), para 68
[372] *Starbucks* (n 8), paras 200-205, 212-216, 359, 373, 391, 402-404, 432-438, 463-465, 474-475, 484, 487, 491-497, 500-501, 518, 521, 548-549; *Apple* (n 8), paras 242-245, 249, 284, 294, 302, 309-310, 312, 348, 373, 390, 399-400, 405, 407, 411-417, 434-435, 448, 475-477, 481, 504
[373] Jaeger, 'Tax Concessions' (n 43), 229

legal certainty. This lack of legal certainty, and the unanswered questions over the potential effects and administration of the EU ALP as it applies to taxation can be problematic for undertakings, as the tax environment is an important element of their future business decisions, including the location of their activities.[374] In short, we know what the EU ALP is not, but we cannot be clear on what it actually is. Given the fact that the EU ALP supersedes national TP rules, this is problematic, as it can infringe on the Member States' fiscal sovereignty. On top of this, the EU ALP can cause policy-making headaches for Member States, both in the context of OECD membership and further developments in the realm of international taxation, and in the context of a conceptual clash with the fundamental freedoms case law on the application of national ALPs.

Second, in the context of the application of the EU ALP, the burden and standard of proof inherent in the notion of advantage were discussed. The problems relating to the content and nature of the EU ALP necessarily make the Court's review of the Commission's analysis stringent, as it is examined in a manner similar to the MEOP. In effect, both principles are analytical tools used to determine the existence of an advantage. Nonetheless, the nature of any ALP, as an approximation, does not sit comfortably next to the objective notion of advantage, as it cannot conceptually offer a clear-cut answer.[375] Thus, the burden and standard of proof need to take into consideration the approximate nature of the ALP. This reflects possibly the only practical limitation to the application of the EU ALP, namely that a well-documented tax ruling is very unlikely to confer an advantage, even if it endorses low effective tax rates.

Third, the reference framework was discussed. It was found that its width, while not *contra legem*, is arguably problematic, especially to the extent that it informs the comparability analysis. This is because it means that practically all undertakings are deemed to be comparable, even though only a select few can engage in TP situations. More importantly however, it was shown that the EU ALP necessarily must form part of the reference framework. This means that the reference framework, and by extension the benchmark based on which "normal" taxation is to be defined, is partly derived from the EU ALP, and by extension EU law. This is problematic both in terms of the rationale of State aid, and in terms of fiscal sovereignty.[376] It is also suggested in this context that the use of the EU ALP as

[374] See for example: Timothy J Bartik, 'Business Location Decisions in the United States: Estimates of the Effects of Unionization, Taxes, and other Characteristics of States" (1985) 3 Journal of Business & Economic Statistics 14; Michael P Devereux and Giorgia Maffini, 'The Impact of Taxation on the Location of Capital, Firms and Profit: A Survey of Empirical Evidence' (2006) Oxford University Centre for Business Taxation Working Paper 07/02; Matthew S Wood, Per Bylund, and Steven Bradley, 'The Influence of Tax and Regulatory Policies on Entrepreneurs' Opportunity Evaluation Decisions' (2016) 54 Management Decision 1160

[375] See for example: Richard (n 47), 43

[376] See for example: Verhagen (n 39), 284; Schön, 'Tax Legislation' (n 316), 9

the relevant tool for the determination of an advantage stems from the width of the reference framework, which in effect does not allow national TP rules to apply in the context they should.

Finally, the combined notion of "selective advantage" was discussed. It was shown that the reasoning of the Commission and the Court in relation to it results in a merging of the two criteria to the point where they cannot be separated, as the advantage analysis, utilising the EU ALP, becomes an integral part of the selectivity analysis. This goes against the established practice in the area of fiscal aid, and against the cumulative nature of the criteria of aid.[377] The merged super-criterion partly results from the concept of the EU ALP. Additionally, it was shown that the combined criterion of selective advantage has the effect of further widening the notion of fiscal selectivity, and therefore fiscal aid.

It becomes clear from this Chapter that the reasoning of the tax ruling Decisions as endorsed by the General Court is problematic on multiple fronts. It is impossible to know whether the ECJ will uphold the EGC's reasoning in relation to the EU ALP, and by extension the (further) blurring of the selectivity and advantage criteria in the context of fiscal aid. What is known however is that the (excessive) width of the reference framework and by the extension of the scope of the comparability analysis follow from the evolution of the case law detailed in the Selectivity Chapter. The same can be claimed to an extent in relation to the merging of selectivity and advantage, at least notionally, if not to the extent this was carried out in the Decisions and judgments at hand. Those two issues in particular can change the scope of application of the notion of fiscal aid, as selectivity is by far the most relevant criterion in this context.[378] Even though the notion of advantage was particularly important in the tax ruling cases, as discussed in the Advantage Chapter, this is not necessary or usually the case with fiscal measures. The expanding width of the notion of fiscal aid can be demonstrated by the *World Duty Free* judgment in relation to general measures.[379]

This evolution of the notion of fiscal aid as seen through the cases discussed in this Chapter, and to an extent throughout this Thesis, is problematic. This is because in relation to fiscal aid we are dealing with what is essentially an incomplete doctrinal construct: there is no comprehensive theoretical framework,[380] or solid enough doctrine[381] to delineate the concept of fiscal aid – this to a large extent

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[377] Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* ECLI:EU:C:2003:415, para 74

[378] *Finanzamt Linz* Opinion of AG Kokott (n 365), para 114

[379] See Part III(d) of the Selectivity Chapter.

[380] Merola (n 264), 539

[381] Hugo López López, 'General Thoughts on Selectivity and Consequences of a Broad Concept of State Aid in Tax Matters' (2010) 9 European State Aid Law Quarterly 807

explains the fluidity of concepts and the lack of clarity within the realm of fiscal aid,[382] and allows for subjective, rather than objective, conceptual developments to occur.[383] Given this conceptual fluidity, maintaining a scope of application of State aid rules to taxation which is functional, meaning neither so narrow so as to be irrelevant nor so wide so as to be threatening to fiscal sovereignty, is paramount. The rationale of the tax ruling cases jeopardises this distinction.

On the one hand, this rationale poses threats to the notion of fiscal sovereignty in more than one ways, as discussed above. It can extend the reach of the State aid prohibition into any "unequal" or differential outcome that exists within a tax system. At the same time, a supranational reference framework is used for the notion of selectivity, and a supranational benchmark used to determine the existence of an advantage. In effect, the reasoning of those cases can allow the Commission to infer the EU ALP into national systems, and use it, in lieu of any national rules. Those cases endorse the existence of a pan-European standard, hidden for almost sixty years in plain sight, in matters of direct taxation and profit allocation. The possibility to use an external reference framework arguably changes the focus of the State aid prohibition from a prevention of unequal treatment to a potential streamlining of fiscal regimes. State aid can by definition only exist within the context of one system, following from the rules and logics of that system. The externalisation of two significant criteria in effect means that the existence of aid follows from the logic of the EU ALP, as opposed to that of the national system. In this context, it is hard to see how any tax ruling regime which does not apply the external EU ALP to its own system does not invite the scrutiny of the Commission. In effect, a tax ruling regime is deemed to be legal, as long as it applies the Commission's *ex cathedra* universally applicable supranational, yet unsubstantiated, EU ALP. And to make matters worse, even if the EU ALP was indeed applied, it is far from certain that its incorporation and application into the national tax system would actually confer legal certainty, due to the principle's distinct lack of clarity.

On the other hand, the reasoning of the tax ruling cases causes significant problems in relation to the notion of fiscal aid itself. The General Court had a great opportunity to discuss comparability, but simply concluded, with scant analysis, that in the context of profit allocation and taxation MNEs are somehow comparable to domestic standalone entities, despite being subject to different legal rules. The formulaic definition of the reference framework which led to this astonishing conclusion is also problematic, as it does not take into account level of generality at which the system operates, or even the very purpose of relevant national rules. In that sense, the new cases represent a missed opportunity, and the confirmation of

[382] Peters (n 167), 13
[383] López López (n 381), 812

problematic trends that reduce the complexity and effects-orientation of the notion of fiscal aid. Importantly, if the merged notion of selective advantage becomes a mainstay of the Commission's and Court's approach, State aid will no longer have as its starting point the existence of an advantage, changing the structure of the system.[384] Additionally, such an approach can have the effect of bringing general measures, or their aftermath, within the scope of State aid, meaning that the notion of selectivity will lose part of its *raison d'être.* In brief, those cases continue, with a vengeance, a trend which was criticised in the Selectivity Chapter and whose effect is the widening of the concept of fiscal aid. The dangers inherent in this of course can be linked to the threats faced by the Member States' fiscal sovereignty.

The only positive element of the cases, which comes from the judgments of the Court and not the reasoning of the Commission, is the confirmation of the stringency of the standard of proof, as well as the allocation of the burden of proof. The approach endorsed by the Court, which can also be applied in "straightforward" fiscal cases,[385] means that the notion of advantage in fiscal cases, if it can be kept clearly distinguished from selectivity, can gain some heft, and become a valuable tool. This would be a welcome development in the Commission's practice – however it does not outweigh the significant systemic problems analysed in this Chapter.

In light of this, the clear conclusion is that the reasoning of the tax ruling cases is rife with novel and unsubstantiated ideas, while also managing to confirm and expand upon a host of existing bad ones. Arguably, the Commission started with the goal of reigning in the abusive practices of MNEs and certain colluding Member States and only then figured out how to get there. The goal may be commendable, but the Commission should have taken to heart the lessons of the fundamental freedoms case law. Negative harmonisation can only go so far; positive harmonisation is necessary to achieve any significant progress.[386] In the aftermath of this noble but misguided attempt we are left with a number of problems, the combined effects of which are threats to fiscal sovereignty and by extension the allocation of competences within the EU framework, and an ever wider, and arguably (even) less fiscal in its outlook, notion of fiscal State aid. The baffling part of this all is that, following the practical limitation stemming from the standard of proof, the invention of an EU ALP and the accompanying wide definition of the reference framework were not actually necessary. In effect, a domestic reference

[384] *MOL Magyar* Opinion of AG Wahl (n 338), para 47; Schön, 'Tax Legislation' (n 316), 12, 16-17; Peter J Wattel, 'Comparing Criteria: State Aid, Free Movement, Harmful Tax Competition and Market Distorting Disparities' in I Richelle, W Schön, E Traversa (eds) *State Aid Law and Business Taxation* (Springer 2016), 61-62, 64

[385] See for example: *Barcelona* (n 245)

[386] See for example: Wattel 'General EU Law Concepts and Tax Law' (n 214), Part 3.2.1.1

framework coupled with the economic rationality of the advantage analysis would have had the same results, and would not have caused a furore.

Conclusion

This thesis, in Part I, thoroughly analysed the notion of fiscal State aid and its components. Based on that analysis, the tax ruling Decisions, and the subsequent EGC judgments to which they gave rise, were critically evaluated in Part II. In brief, Part I illustrated that fiscal State aid is different from non-fiscal aid, by virtue of the different application of the criteria of State aid to fiscal cases. As a result, it was shown that the notions of selectivity and advantage are by far the most relevant ones. The consistent widening of the former however has led to the widening of the notion and by extension the scope of fiscal aid in general. In Part II, the problems identified with the notion of fiscal aid were analysed in light of the Commission's tax ruling Decisions. Utilising the international tax context of the contested rulings, that analysis clearly demonstrates that the reasoning employed in those Decisions is deeply flawed. In effect, both Parts illustrate how the expansion of the concept and of the scope of fiscal aid can significantly limit Member States' fiscal sovereignty. This conclusion will summarise the findings of the thesis, and present the notion and scope of fiscal aid as it emerges from the combined analysis of Parts I and II.

a. The Criteria of Fiscal Aid

By looking at the five cumulative[1] criteria of fiscal aid, it is possible to adduce that the most important and relevant one is selectivity.[2] This conclusion is unsurprising, as the notion of State resources, by its own internal inherent logic, will almost always be satisfied in relation to fiscal aid, as such aid is imputable to the State, and results in foregone revenue, satisfying both limbs of the criterion.[3] At the same time, the criteria of effect on trade and distortion of competition are generally easy to satisfy.[4] On top of this relative ease of satisfaction, due to the classification of fiscal aid as operating aid,[5] and the generally accepted harmful character of operating aid, the CJEU has developed doctrines and presumptions which mean that fiscal aid will almost certainly be seen as distorting competition and affecting trade.[6] Thus, we are left with the criteria of selectivity and advantage.

As shown in the relevant Chapter, the criterion of advantage contains a Market Economy Operator Principle (MEOP) which lends the criterion substantial

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[1] Joined Cases C-278/92, C-279/92, and C-280/92 *Spain v Commission* ECLI:EU:C:1994:325, para 20; Case C-482/99 *France v Commission* ECLI:EU:C:2002:294, para 68; Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* ECLI:EU:C:2003:415, para 74

[2] Case C-66/14 *Finanzamt Linz v Bundesfinanzgericht, Außenstelle Linz* Opinion of AG Kokott ECLI:EU:C:2015:242, para 114

[3] *France v Commission* (n 1), para 24

[4] Joined cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* Opinion of AG Jacobs ECLI:EU:C:1994:112, para 33

[5] Thomas Jaeger, 'Tax Measures' in F J Säcker and F Montag (eds) *European State Aid Law* (Beck Hart Nomos 2016), para 93

[6] Case C-496/06 P *Commission v Italy and Wam SpA* ECLI:EU:C:2009:272, para 51

weight, but even though the MEOP is in principle applicable to fiscal cases,[7] in practice it is unlikely it can apply to such cases. Without the MEOP, the notion of fiscal advantage is quite simplistic,[8] but despite this, the Commission has to examine the applicability of the MEOP in any given case.[9] Similarly, it is clear that the Commission has to take all available information into account to establish the existence of a fiscal advantage,[10] even when the MEOP is not applicable. This includes the fiscal context of the contested measure. As such, the advantage criterion can be relevant in practical terms, due to the burden and standard of proof attached to it, as evidenced by the Court's judgment in *Apple*.

As the notion of advantage is preoccupied with economic benefits not obtainable on normal market conditions, including the mitigation of applicable charges,[11] it becomes clear that it is conceptually very close to the typical fiscal selectivity analysis. The reference framework represents the normal market conditions, those applicable in principle to all, while the benefits or mitigations represent the derogation. The difference between what should have been paid (counterfactual) and what was paid is the economic advantage, and its selective granting is what is deemed problematic under State aid law. In this context, it is imperative to stress out that the concepts of selectivity and advantage are separate, and should be approached and analysed as such.[12] The term "selective advantage" refers to the selectivity of a given advantage.[13] This follows from the structure of the Article 107(1) TFEU prohibition and the cumulative nature of the criteria; a non-selective advantage will not confer State aid while a selective measure which does not grant an advantage will equally not result in a finding of State aid. Thus, it is important to analytically distinguish between the two. The notion of advantage, and its existence, are after all the starting point of any State aid analysis.

Selectivity, as an independent criterion, is therefore the crux of fiscal aid, as even "normal" taxation and the counterfactual that are relevant for the determination of an advantage follow to a large extent from the notion of selectivity. This of course does not mean that the remaining criteria should be discounted, both from a formalist standpoint as they form part of the Treaty prohibition, and from a

[7] Case C-124/10 P *Commission v EDF* ECLI:EU:C:2012:318, paras 103-104
[8] Case C-66/02 *Italy v Commission* ECLI:EU:C:2005:768, para 78
[9] Case C-405/11 P *Commission v Buczek Automotive* ECLI:EU:C:2013:186, para 33; Case C-224/12 P *Commission v Netherlands and ING Groep* ECLI:EU:C:2014:213, para 33; Case C-300/16 P *Commission v Frucona Košice* ECLI:EU:C:2017:706, para 36
[10] Case T-865/16 *Fútbol Club Barcelona v Commission* ECLI:EU:T:2019:113, paras 66-67
[11] Case C-501/00 *Spain v Commission* ECLI:EU:C:2004:438, para 115
[12] Case C-15/14 P *Commission v MOL Magyar Olaj- és Gázipari Nyrt* ECLI:EU:C:2015:362, para 59; Case C-15/14 P *Commission v MOL Magyar Olaj- és Gázipari Nyrt* Opinion of AG Wahl ECLI:EU:C:2015:32, para 47
[13] See for example: Case C-706/17 *Achema AB and Others v VKEKK* ECLI:EU:C:2019:407, paras 81-88

functional one as they can be situationally very important, albeit in a limited number of cases.

b. The Problems with Selectivity and the Fiscal Aid Regime

Fiscal selectivity in itself is far from settled. However, as discussed in the relevant Chapter, the structure of the selectivity analysis is settled, and has been reiterated consistently by the CJEU. This analysis is based on a three-step test.[14] The first step is to determine the reference framework, and the second one is to identify a derogation or differentiation in treatment between undertakings whose legal and factual situation is comparable in light of the objectives of the system or measure. If those two steps are satisfied, then a measure will be deemed *prima facie* selective, subject to a potential justification, which is the third step. Out of the three steps, only the last is consistent, but still necessitates a case by case analysis.[15] At the same time, the first two steps were shown to have become increasingly wider,[16] and lacking in internal consistency.[17] This results from the rigidity with which fiscal selectivity has on occasion been applied, and from the fact that the case law is incoherent.[18] The wider interpretation of the fiscal selectivity test in essence means that the selectivity criterion is easier to satisfy. In the context of the above discussion, this obviously can be problematic, as it has been demonstrated that selectivity is the centrepiece of the analysis, meaning that if the criterion of selectivity is met then it is very probable that the contested measure will be found to constitute (probably incompatible) State aid. Selectivity analyses may have become more intricate, but not necessarily more coherent.[19]

It is possible to attribute the difficulties of applying the criteria of Article 107(1) TFEU to fiscal measures to their fiscal nature. The case law on the quasi-jurisdictional criteria of effect on trade and distortion of competition contains presumptions, general and specific, against fiscal aid due to its great distortive

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[14] Case C-143/99 *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten* ECLI:EU:C:2001:598, para 41; Joined Cases C-20/15P and C-21/15P *Commission v World Duty Free Group (formerly Autogrill España), Banco Santander & Santusa Holding*, ECLI:EU:C:2016:981, paras 57-58

[15] Jaeger, 'Tax Measures' (n 5), para 53

[16] A Bartosch, 'Is There a Need for a Rule of Reason in European State Aid Law? Or How to Arrive at a Coherent Concept of Material Selectivity?' (2010) 47 Common Market Law Review 729, 732; Claire Micheau, 'Tax Selectivity in State Aid Review: A Debatable Case Practice' (2008) 17 EC Tax Review 276, 282

[17] Compare the vastly different outcomes between Case C-6/12 *P Oy* ECLI:EU:C:2013:525, and Case C-203/16 P *Dirk Andres (faillite Heitkamp BauHolding) v Commission* ECLI:EU:C:2018:505, or Case C-128/16 P *Commission v Spain and Others* ECLI:EU:C:2018:591, and Case C-100/15 P *Netherlands Maritime Technology Association v Commission* ECLI:EU:C:2016:254.

[18] Massimo Merola, 'The Rebus of Selectivity in Fiscal Aid: A Nonconformist View on and Beyond Case Law' (2016) 39 World Competition 533, 553

[19] Christoph Arhold, Viktor Kreuschitz, Franz Jürgen Säcker, Ulrich Soltesz, Michael Shuette, Andreas Schwab, 'Article 107 TFEU' in F J Säcker and F Montag (eds) *European State Aid Law* (Beck Hart Nomos 2016), para 375

potential. Similarly, since taxation results from legislation enacted by the State and given that funds not collected and therefore effectively removed from the State's budget are construed as a burden for the purposes of State aid law, the fiscal nature of a measure leads it to satisfy the State resources criterion. In relation to the notion of advantage, since taxation and fiscal measures in general, are a result of the State exercising powers stemming from its role as a public authority, the MEOP's usefulness as an analytic tool is greatly reduced, due to the practical difficulties relating to the applicability and application of the MEOP when an indissoluble link exists between an act of the State as an economic operator and as a public authority. It becomes clear that in most fiscal cases the advantage analysis, devoid of the MEOP, will end up being akin to a bare-bones selectivity-style analysis.

Despite the fact that selectivity is arguably more developed that the other four criteria as they apply to fiscal cases, some of the problems identified and discussed in the selectivity Chapter also stem from the contested measure's fiscal character, or at the very least from the intricacies and complexity of taxation and the concurrent formalism[20] in the application of the selectivity test. Taxation is inherently top-down, with general rules establishing the system and more specific ones qualifying its application,[21] and as such fiscal systems are made of many rules, operating at differing levels of generality, applying simultaneously. This makes the determination of a reference framework considerably more complex. However, the reference framework tends to overlook the systemic design of tax systems, focusing on specific rules divorced from their logical fiscal context (which arguably results from the bottom-up nature of many State aid investigations). At the same time, the comparability analysis tends to be undertaken in light of exceedingly wide objectives, like the raising of revenue for the State, artificially blinding State aid law to the great policy-making power of taxation, and leading to situations where economic operators to whom a specific rule, with a differing objective from the basic one, applies are deemed comparable with undertakings to whom it does not. In essence, the combination of the issues that can be found in the case law of fiscal selectivity can render the notion and the test incapable of performing their essential part in the State aid analysis, distinguishing between general fiscal measures and anticompetitive ones.

c. The Tax Ruling Decisions in Context

The tax ruling Decisions, given the evolution of the notion of fiscal aid, are not particularly surprising. The discovery of the ALP and its use as a tool were certainly innovative, and as discussed in the relevant Chapter, problematic in a variety of ways, but to an extent the use of the ALP resulted from the exceedingly

[20] Merola (n 18), 539

[21] Jérôme Monsenego, *Selectivity in State Aid Law and the Methods for the Allocation of the Corporate Tax Base* (Kluwer Law International 2018)

wide reference framework. In this sense, the rationale that underpins the tax ruling Decisions, and the first wave of judgments, is arguably problematic on two different grounds.

First, it confirms an effectively substance-free version of the selectivity analysis, where the reference framework, and its objectives used to frame the comparability analysis, are mere box ticking exercises. The Commission, and the General Court, accepted that MNEs and standalone companies are comparable with scant analysis, even though the two groups are subject to different legal regimes, and differing economic realities and rationalities. The definition of the reference framework as the general corporate tax regime overlooks the level of generality at which a general system has to operate, and effectively disregards the very purpose of national profit allocation rules and practices. This has the effect of widening the very notion of fiscal State aid. As a result of this approach, where all undertakings are comparable, the distinction between the actual advantage and its selective nature breaks down to an extent, as can be evidenced by the effective merger of the selectivity and advantage into a single criterion in the tax ruling Decisions. This is because any advantage that exists is selective if not available to all comparable undertakings – which in turn means all undertakings that are liable to pay corporate tax. The rationale of the Decisions, as well as its in principle acceptance by the Court (after all, the Court merely disagreed with the Commission's math) is only possible because of the widening of the notion of fiscal selectivity. In a sense, the chickens of *World Duty Free* have come home to roost.

Secondly, there is the issue of the use of the ALP. The Commission's discovery of a supranational principle, and its assertion that it is the one relevant for establishing the existence of an advantage in the context of TP was always bound to capture the headlines[22] – the choice of the targets also helped in this context.[23] Of course it is true that the foundation and conception of the EU ALP, its supersession of national rules, and its nebulous content and nature are significant problems in and of themselves. It is clear that beyond the significant legal uncertainty created by the Commission's approach, fiscal sovereignty is also a thorny issue. The relationship between State aid and taxation has not always been an easy one in this context, but the EU ALP is a different kind of beast. It has the potential, as explained in the relevant Chapter, to turn the Commission into a fiscal enforcer and to create a significant degree of (backdoor) harmonisation. However, despite the attention that those Decisions are getting, we must not assume that all was good in the realm of fiscal State aid before they were adopted. Despite the

[22] Peter J Wattel, 'Stateless Income, State Aid and the (Which?) Arm's Length Principle' (2016) 44 INTERTAX 791, 792

[23] Romero J S Tavares, Bret N Bogenschneider, and Marta Pankiv, 'The Intersection of EU State Aid and U.S. tax Deferral: A Spectacle of Fireworks, Smoke, and Mirrors' (2016) 19 Florida Tax Review 121, 144

innovativeness of the EU ALP, the flaws in the reasoning and treatment of fiscal aid that permeate the Decisions are effectively symptoms of the problems that exist within the notion of fiscal aid in general. The Commission is only able to invoke and rely on the EU ALP because the reference framework is defined in a formulaic and exceedingly wide manner. The serious symptom that is the EU ALP should not mean we ignore its root cause. The same applies to the imposition of extra-systemic elements to the reference framework – it represents a tangible threat to fiscal sovereignty, but it stems from the problems within the notion of fiscal aid itself. The supranational EU ALP and the extra-systemic reference framework are, simply put, a bold new step down the well-trodden path of generally ignoring the structure, rationale and context of national tax rules.

In other words, the tax ruling Decisions, and subsequent General Court judgments, are excellent examples of the tension between the notion of fiscal sovereignty, and the role and concept of fiscal State aid. The bluntness of the reasoning, as well as the invocation of a novel principle superseding national law and being inferred into national law were bound to raise a few eyebrows. The problems with those Decisions are significant, even if seen in a vacuum. But they did not originate in a vacuum – they followed from a problematic practice of non-substantive analysis and constant widening of fiscal State aid. The tax ruling saga to an extent is the culmination of the evolution of the notion of fiscal aid as has been analysed in this thesis. The consistent widening of the scope of fiscal aid, including its potential application to general measures and secondary, non-predictable, differentiated effects, already represented a significant limitation to Member States' fiscal sovereignty. But the EU ALP goes further than that. It pushes aside national rules by introducing an ill-defined EU principle into the reference framework, and by using that very same principle as the basis upon which the counterfactual for the purposes of the advantage analysis is to be defined. Thus, the introduction of a supranational EU ALP, divorced from national rules and international practice, represents a much more severe threat to that sovereignty, as it, stealthily but surely, pushes towards fiscal harmonisation.[24] The obvious problems with the explicitly innovative elements of the reasoning, namely and mainly the EU ALP, must not be overlooked, but at the same time we must avoid missing the forest for the tree and concentrate solely on those issues. The notion of fiscal State aid was in a bad shape before those Decisions, and it will remain in such a shape even if, once all the appeals are finished and the dust has settled, the Decisions are annulled and their reasoning forgotten. In effect, the expansion of the scope of the notion of fiscal aid detailed throughout this thesis has changed the norms applicable to the interaction of Article 107 TFEU and direct taxation, and has thus, on multiple fronts, allowed for

[24] See for example: Dimitrios A Kyriazis, 'From Soft Law to Soft Law through Hard Law: The Commission's Approach to the State Aid Assessment of Tax Rulings' (2016) 15 European State Aid Law Quarterly 428, 436

the erosion of fiscal sovereignty, and by extension has limited Member States' ability to use their fiscal regimes as policy tools.

d. The Notion and Scope of Fiscal Aid

The notion of fiscal aid is clearly based on the interpretation of its constituent elements. It has been shown in Part I of this thesis that fiscal State aid is different from "normal" aid. It has, by its very nature, to be different, as the criteria of aid struggle with fiscal elements. This, when read in conjunction with the case law on the notions of effect on trade and distortion of competition, means that selectivity and advantage are the only criteria that end up mattering, generally speaking. And even those two are not unaffected by the fiscal nature of their subject matter. It has also been shown that the notion of fiscal selectivity, which is the decisive one for the scope of the fiscal aid prohibition has been significantly widened and can catch, beyond *ab initio de facto* selective systems, general non-compulsory measures. The width of the scope of the prohibition becomes more alarming when placed in the context of the compatibility regime, which due to the notion of incentive effect is generally predisposed against operating aid – which is the form the majority of fiscal aid takes.[25] The GBER also imposes different conditions when it comes to fiscal aid, making the effective and lawful granting of such aid a difficult task. This is further exacerbated as a result of the potential conflict between fiscal aid measures and other internal market provisions, which can make the measures, even if they pass the incentive effect test, incompatible with the internal market. It is clear that as a result of the notion of fiscal selectivity in particular, and the compatibility regime, fiscal sovereignty is in fact relatively limited, when it comes to small scale changes. Even systemic changes are not immune from State aid control. Thus, in this context, the tax ruling Decisions essentially continue a path of State aid being used as a fiscal policy convergence tool. The erosion of fiscal sovereignty via slow fiscal convergence is a natural by-product of the internal market striving to eliminate distortions. This process can be evidenced, beyond State aid control, via the interaction of the fundamental freedoms and national tax laws.[26] However, the tax ruling Decisions take this erosion of fiscal sovereignty to a whole new level, by effectively enforcing an extra-systemic reference framework and a Union-wide standard for TP situations, where the Commission is in charge of making, interpreting, and applying the rules. They are bolder in their assertions, and they represent a different type of threat to fiscal sovereignty. One that is far more obvious

[25] Jaeger, 'Tax Measures' (n 5), para 93

[26] The Court's jurisprudence has had an effect on Member States' tax systems, forcing a number of changes of domestic law. See, for example J Malherbe, P Malherbe, I Richelle, E Traversa, D De Laveleye, *The Impact of the Rulings of the European Court of Justice in the Area of Direct Taxation 2010* (European Parliament Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy, IP/A/ECON/ST/2010-18, PE 457.367 2010), which provides ample examples of such changes.

and immediate than the slow convergence of typical fiscal aid control, which still relies to an extent on the characteristics of the examined system to pass judgment. The line of reasoning contained in the Decisions, and its implications, go far beyond the long tradition of Member States surrendering *some* of their sovereignty for the success of the Union.[27]

Oddly enough, there seem to be opposing movements in the evolution of the notions of selectivity and advantage. The notion of fiscal advantage can be described as devoid of substance,[28] but is becoming increasingly substantive, at least in practical terms. The fact that the MEOP is, in principle at least, applicable in fiscal cases – and that its applicability *must* be ascertained by the Commission, combined with the high standard of proof evident in the case law show that advantages, fiscal or not, must be positively proven. Given the complexities of taxation this can be easier said than done – a simple yes or no answer may not always be obvious.[29] At the same time, this trend in the case law ensures that the fiscal environment is taken into consideration at least at some point in the State aid analysis, as it is one of the relevant factors that ought to be examined.[30]

Selectivity on the other hand, despite the often interesting approaches the Court comes up with, seems to be becoming itself a notion devoid of substance. As detailed in this thesis, and as discussed above, the three-step test has been significantly widened, especially in relation to the determination of the reference framework, the notion of a derogation, and the comparability analysis. The test has been made so functional it effectively has very few, if any, limits. The widening of the fiscal selectivity test means that general measures are within the scope of aid – under a wide framework with equally wide objectives, a measure that does not end up benefitting all operators can be deemed to be selective.[31] It is clear that the reference framework sits at the centre of those issues, as it informs the entirety of the three-step test.[32]

There is no easy or obvious solution to the wide conception of the reference framework, but this thesis has advocated for a holistic approach which ought to focus on the coherent sum of the applicable fiscal rules, and thus be truly effects-

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[27] Cees Peters, 'Tax Policy Convergence and EU Fiscal State Aid Control: In search of Rationality' (2019) 28 EC Tax Review 6, 9

[28] Jaeger, 'Tax Measures' (n 5), para 75

[29] Werner Haslehner, 'Double Taxation Relief, Transfer Pricing Adjustments and State Aid Law' in I Richelle, W Schön, E Traversa (eds) *State Aid Law and Business Taxation* (Springer 2016), 148; Anna Gunn, and Joris Luts, 'Tax Rulings, APAs and State Aid: Legal Issues' [2015] EC Tax Review 119, 121, 124-125

[30] See for example: *Barcelona* (n 10), para 38; Begona Perez Bernabeu, 'How to Determine the Existence of a Tax Advantage: The F.C. Barcelona Case' (2019) 18 European State Aid Law Quarterly 377, 380

[31] *World Duty Free* (n 14), para 76

[32] Case C-270/15 P *Belgium v Commission* Opinion of AG Bobek ECLI:EU:C:2016:289, para 29

oriented. In a similar vein, it is submitted that the justification step should adopt a more fiscal outlook, and examine the coherence and internal consistency of a given system, alongside the other tax-specific justifications. The combination of those two elements would exclude from the scope of selectivity, and therefore State aid, differential outcomes stemming from the application of an internally cohesive system. A more fiscal outlook, which would mean that tax principles would inform and influence the application of the selectivity test, is necessary. Effectively, selectivity would be examined in light of a system's internal coherence.[33] This would allow for the notion of State aid to consistently and correctly examine the effects of a given measure,[34] as it would be able to do so through the correct lens, as opposed to relying on an increasingly formalistic construct. Arguably, the Court's approach to the notion of advantage, where all elements of the fiscal regime must be taken into account, reflects a more fiscal outlook.

Even with a revised outlook, advantage and selectivity are bound to remain the only relevant criteria in the vast majority of fiscal cases, as a result of the presumptions against operating aid in general and fiscal aid specifically, and the internal logic of the State resources criterion. The limits the remaining criteria impose are important, but beyond those, both analytically and practically, they are a mere formality in the very vast majority of fiscal cases. Given that advantage is primarily a factual exercise, and that the other three criteria have a very limited role to play, the widening of fiscal selectivity results in the widening of the notion of fiscal aid in general and as a concept. The tax ruling Decisions should be seen as cautionary tales of what the exceedingly wide conception of fiscal selectivity entails, and how a hugely controversial innovation such as the ALP can follow almost seamlessly from the established practice on the reference framework, and on fiscal aid in general. In a sense, the Decisions thus showcase why the characteristics of tax law should be taken into account in the analysis of fiscal State aid – or in other words why a more fiscal outlook is necessary.

[33] Roberto Cisotta, 'Criterion of Selectivity' in H Hofmann and C Micheau (eds) *State Aid Law of the European Union* (OUP 2016), 133

[34] Thomas Jaeger, 'Taking Tax Law Seriously: The Opinion of AG Mazak in EDF' (2012) 11 European State Aid Law Quarterly 1, 3

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